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INTERNATIONAL CREDIT TRANSFERS

Comments on the Draft Model Law on International Credit Transfers

Report of the Secretary-General

CONTENTS

Page

INTRODUCTION 3

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS 4

CHAPTER I. GENERAL PROVISIONS 6

Article 1. Sphere of application 6
Article 2. Definitions 10
Article 3. Contents of payment order (Deleted) 22

CHAPTER II. DUTIES OF THE PARTIES 23

Article 4. Obligations of sender 23
Article 5. Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank 33
Article 6. Obligations of receiving bank that is not the beneficiary's bank 38
Article 7. Acceptance or rejection by beneficiary's bank 43
Article 8. Obligations of beneficiary's bank 45
Article 9. Time for receiving bank to execute payment order and give notices 50
Article 10. Revocation 54

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS 62

Article 11. [Assistance and refund] 62
Article 12. Liability and damages 65
Article 13. Exemptions 78

Page

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFERS 79

Article 14. Payment and discharge of monetary obligations; obligation of bank to account holder 79

CHAPTER V. CONFLICT OF LAWS 84

Article 15. Conflict of laws 84

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Article 16. [Variation by agreement] 88

INTRODUCTION

1. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers (A/CN.9/SER.B/1) as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Payments (A/41/17, para. 230).

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987 at which it considered a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. At its seventeenth session held in New York from 5 to 15 July 1988 the Working Group considered a text of the draft provisions prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the close of the session the Working Group requested the Secretariat to prepare a revised draft of the provisions (A/CN.9/317, para. 10).

4. At its eighteenth session held at Vienna from 5 to 16 December 1988 the Working Group began its consideration of the redraft of the Model Rules prepared by the Secretariat in A/CN.9/WG.IV/WP.39. It renamed the draft Model Rules as the draft Model Law on International Credit Transfers (A/CN.9/318). The Working Group continued its consideration of the draft provisions at its nineteenth session held in New York from 10 to 21 July 1989. During the session a drafting group prepared a restructured text of the draft Model Law (A/CN.9/328, annex I). The restructured text was discussed at the twentieth session of the Working Group held at Vienna from 27 November to 6 December 1989. A drafting group revised articles 1 to 9 of the draft Model Law but left articles 10 to 15 unchanged (A/CN.9/329, annex). The Working Group continued its discussion of the draft Model Law at its twenty-first session held in New York from 9 to 20 July 1990 where a certain number of changes in the text were adopted. In a number of other cases the Working Group decided that the draft Model Law should be changed to reflect a certain policy decision, but did not adopt a specific text to reflect that decision. All such policy decisions, as well as a few made at prior sessions of the Working Group, were reflected in footnotes to the draft Model Law as it appeared in the annex to the report of the twenty-first session (A/CN.9/341, annex).

5. This report contains a commentary on the draft articles of the text as it emerged from the twenty-first session of the Working Group (A/CN.9/341, annex), indicating their history and their relationship to other provisions. Where the commentary is historical, where the text of an article was not considered at the twenty-first session, or the text of an article was considered but not changed, the commentary is often identical to that in A/CN.9/WG.IV/WP.46. The report also contains suggested texts to implement the policy decisions that have been made by the Working Group.

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6. A new feature of this report is that it provides references to the relevant provisions in Article 4A of the Uniform Commercial Code of the United States for comparison. Article 4A governs the same kinds of credit transfers as does the draft Model Law, except that Article 4A is not limited either to domestic or to international credit transfers. Its preparation began in the United States somewhat before the beginning of the preparation of the Model Law.

7. The principal interest in Article 4A arises out of the fact that it is the only legislative text in existence that provides a basic legal structure for credit transfers. In all other States, including those States where credit transfers have been the principal means of interbank payments, the law of credit transfers is derived from a multitude of sources. As a result, the draft of Article 4A that was current at the time of a meeting of the Working Group has often been a source of ideas for the consideration of the Working Group.

8. The final text of Article 4A was adopted by its sponsoring organizations in August 1989 and soon thereafter was presented to the individual states within the United States for adoption. It has been adopted by a number of those states, including the state of New York, where the Clearing House Interbank Payments System (CHIPS) is located. It will also govern the operations of the Federal Reserve System wire transfer network (FEDWIRE) once the proposed Regulation J is adopted.

9. Summary comparisons between the Model Law and Article 4A are often difficult because of the differences in the structure and in the drafting style of the two texts. Article 4A often goes beyond the enunciation of a general rule, as does the draft Model Law, by providing for a number of detailed implementing sub-rules and by providing for many of the more important exceptions to the general rule. These implementing sub-rules and exceptions are often important. Furthermore, the complexity of the text, often brought about by the level of detail contained in it, has led to extensive explicit and implicit cross-referencing. Since the full context of the Article 4A rules cannot be set out in the summary comparisons stated in this report, the interested reader should turn to the full text of Article 4A itself.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

A/CN.9/318, paras. 10 to 19
A/CN.9/329, paras. 11 to 15

Comments

1. The current title was adopted by the Working Group at its eighteenth session. The Working Group decided that the words "Model Law" should be used in the title to reflect the fact that the text was for use by national legislators and that the text should not for the time being be in the form of a convention (A/CN.9/318, paras. 12 and 13).

2. The use of the words "Credit Transfers" reflected the decision that only credit transfers and not debit transfers should be included (A/CN.9/318, para. 14). The decision is set forth as a rule in article 1(1). Credit transfers are defined in article 2(a).

3. The word "electronic" is not used in the title as a result of the decision that the Model Law would be applicable to paper-based credit transfers as well as to those made by electronic means (A/CN.9/318, paras. 15 to 17). At the twenty-first session, while no suggestion was made that the Model Law should not apply to paper-based credit transfers, there was general agreement that the Model Law should be drafted so as to meet the operating needs of high speed electronic credit transfers (A/CN.9/341, para. 28; see also paras. 24 to 27 and 56).

4. The Working Group at the eighteenth session decided that the Model Law should be restricted to international credit transfers and that that decision should be reflected in the title (A/CN.9/318, para. 18). At its twentieth session the Working Group reaffirmed its decision to restrict the sphere of application of the Model Law to international credit transfers (A/CN.9/329, paras. 12 to 15). It noted that the preparation of a model law applicable to domestic as well as international credit transfers was within its mandate. However, it also noted that there were differences between the two types of transfers that justified different treatment of some of the legal issues that arose. Furthermore, appropriate solutions might not be the same in all States for domestic credit transfers. As a result it was believed to be preferable not to confront the difficult political problems that might be created by providing in the Model Law that it applied to all credit transfers. Nevertheless, some States might wish to apply the Model Law to both domestic and international credit transfers.

5. The criteria for determining whether a credit transfer is international are to be found in article 1.

Comparison with Article 4A

6. The title of Article 4A, "Funds transfers", and the definition of that term in Article 4A-104, are an indication that in the greatest respect the substantive spheres of application are almost identical. Although Article 4A was prepared because of the recent development of high-speed high-value credit transfers in the United States, it would apply to transfers made by any technology. For example, Article 4A-302(a)(2) anticipates the execution of a payment order "by first class mail" under certain circumstances. However, since there has never been an interbank paper-based credit transfer system in the United States, and since the credit transfer system based on the bulk exchange of payment orders, especially by the physical exchange of magnetic tapes and similar devices, is of comparatively minor importance, the substantive rules are oriented towards the exchange of individual high-speed high-value payment orders.

CHAPTER I. GENERAL PROVISIONS

Article 1. Sphere of application *

(1) This Law applies to a credit transfer where a sending bank and its receiving bank are in different States.

(2) For the purpose of determining the sphere of application of this Law, branches of a bank in different States are considered to be separate banks.

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* This law is subject to any national legislation dealing with the rights and obligations of consumers.

Prior discussion

A/CN.9/297, paras. 12 to 23 and 29 to 31
A/CN.9/317, paras. 16 to 24, 30 and 95 to 97
A/CN.9/318, paras. 20 to 34, 53 and 54
A/CN.9/329, paras. 12 to 25 and 194
A/CN.9/341, paras. 57 to 65

Error in A/CN.9/341, annex

The footnote to article 1 as set out in A/CN.9/341, annex refers to "this Model Law".

Comments

1. The general scope of article 1 was adopted by the Working Group at its eighteenth session (A/CN.9/318). It was reconsidered at the twentieth and twenty-first sessions, where several amendments were adopted (A/CN.9/329 and A/CN.9/341).

Internationality of a transfer

2. As indicated by the title, the Model Law will apply only to credit transfers that are international. However, at the twentieth session the Working Group noted that some States might wish to apply the Model Law to both domestic and international transfers (A/CN.9/329, para. 14).

3. The test of internationality in paragraph (1) as it was adopted at the eighteenth session was that the originator's bank and the beneficiary's bank were in different countries. The Working Group decided at its twentieth session to eliminate the result pointed out in A/CN.9/WG.IV/WP.44, article 1, comments 4 to 6 that, since a bank that originated a credit transfer for its own account was an originator and not an originator's bank, a transfer by such a bank to a second bank through a mutual correspondent bank would not fall within the sphere of application of the Model Law even if all three banks were in different States. In order to carry out its decision, the Working Group decided to add the words "or, if the originator is a bank, that bank and its receiving bank are in different countries" (A/CN.9/329, paras. 16 to 23). The formulation was changed by the drafting group, a result that the Working Group disavowed during the adoption of the report of the twentieth session but did

not correct for lack of time (A/CN.9/329, para. 194). At the twenty-first session the Working Group began by returning to the original formula (A/CN.9/341, para. 58). After discussion it adopted the current text of paragraph (1) (A/CN.9/341, para. 64).

4. The current formula requires that any one sending bank and its receiving bank in the chain of sending and receiving banks that carry out the credit transfer must be in different States. If any such pair of sending and receiving banks is located in two States, the credit transfer is international and the Model Law applies to every segment in the chain. This is so even though a particular segment is between a sender (originator or sending bank) and a receiving bank in the same State. Except for the originator's bank, the first receiving bank in every State involved in a particular credit transfer necessarily receives a payment order from a sending bank in another State. However, the originator, the originator's bank as well as the next several receiving banks in the credit transfer chain may be in the same State. All of the payment orders between these parties are subject to the Model Law even though they are prior to the sending of a payment order from a sending bank in that State to a receiving bank in another State.

5. Since paragraph (1) refers only to the location of a sending bank and a receiving bank, the location of a non-bank sender is irrelevant for determining whether the credit transfer is international. Therefore, when a non-bank originator resident in State A issues a payment order to the originator's bank in State B instructing a transfer to the account of the beneficiary at the same or a different bank in State B, the credit transfer would not be international. However, if the originator resident in State A was a bank, its payment order to its bank in State B would be between banks in different States and the credit transfer would be international.

6. In some cases in which a transfer is made from a customer's account in a financial institution in State A to an account in a financial institution in State B, the sending financial institution may not be considered to be a bank under the definition of a bank in article 2(f). Such a situation might arise where the sending financial institution was a broker which would, on instructions of a customer, transfer a credit balance in a customer's brokerage account, but which did not engage in executing payment orders as an ordinary part of its business. See comment 30 to article 2. In that case the sending financial institution would not be a bank. A similar situation arises when the receiving financial institution in State B is not a bank and the payment order issued to it is the only payment order to go from one State to another. In either of those situations the Model Law would not apply. At the twenty-first session of the Working Group the definition of a "bank" in article 2(f) was modified so as to increase the likelihood that an entity that held accounts of its customers that were subject to payment orders would be considered to be a bank. See comment 33 to article 2.

7. A transfer may be international even though the originator's bank and the beneficiary's bank are in the same State. That situation can occur when a transfer between an originator's bank and a beneficiary's bank, both of which are in State A, is denominated in the currency of State B. In such a case the originator's bank would often send a payment order to its correspondent bank in State B instructing it to credit the account of the beneficiary's bank, or instructing it to send a payment order to the correspondent bank of the beneficiary's bank in State B. When the transfer is carried out in that manner, there is a sending bank and a receiving bank in two different States and the credit transfer is subject to the Model Law.

8. There is one situation where the transfer between two banks in State A denominated in the currency of State B would not be international and a second where it is not clear whether it would be international. The transfer would not be international if there was a clearing in State A in the currency of State B and the transfer was executed through that clearing, since no payment order would be sent between State A and State B.

9. It is not clear whether the transfer is international where the originator's bank in State A sends its payment order directly to the beneficiary's bank in State A and pays the beneficiary's bank the amount of that payment order by sending a second payment order to its correspondent bank in State B with instructions to credit, or to cause to be credited, the account of the beneficiary's bank at the correspondent bank. It has been said that in such a case the instruction from the originator's bank to the third (reimbursing) bank to credit the account of the beneficiary's bank is a separate credit transfer from the credit transfer between the originator's bank and the beneficiary's bank. Under that interpretation, the transfer between the originator's bank and the beneficiary's bank in the currency of State B is not an international credit transfer under paragraph (1). However, the credit transfer by which the originator's bank instructs its correspondent bank in State B to reimburse the beneficiary's bank by crediting its account would be an international credit transfer and subject to the Model Law. That interpretation was given at the twenty-first session, but it does not figure in the report of the session. However, that interpretation was specifically rejected at the twentieth session of the Working Group when the concern was whether a reimbursing bank was an "intermediary bank" (A/CN.9/329, paras. 70 and 71; see comment 44 to article 2).

10. Opposition to the results described in comments 7 to 9 were expressed at the twenty-first session, as well as at the eighteenth session when a similar proposal was before the Working Group, because of the possibility that the same instruction from the originator might be subject to the Model Law or not depending on the particular means of settlement chosen. It was said that even the originator's bank might not know the routing the credit transfer would take or the settlement procedures to be used where the originator's bank sent its payment order to another bank in the same State that handled international and foreign currency transfers (A/CN.9/318, paras. 25 to 26 and A/CN.9/341, para. 62). At the eighteenth session it was said that that result was not appropriate since the transfer would otherwise be identical from an economic point of view. At the twenty-first session the results described in comments 7 to 9 were accepted since it would always be possible for the originator to specify to its bank the routing of the credit transfer.

11. Since the application of the Model Law depends on the existence of two banks in different countries, normally it would not apply where the originator and the beneficiary had their accounts in the same bank. However, according to paragraph (2), for the purposes of the sphere of application of the Model Law, branches of a bank in different States are considered to be separate banks. Therefore, a transfer is within the application of the Model Law even though only one bank is involved when the originator's account and the beneficiary's account are in branches of that bank in different States.

12. Restricting application of the Model Law to international credit transfers means that a State that adopts the Model Law will potentially have two different bodies of law governing credit transfers, one applicable to domestic credit transfers and the Model Law applicable to international credit transfers. In some countries there are no domestic credit transfers or the

domestic elements of international transfers are segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers are processed through the same banking channels. In those countries it would be desirable for the two sets of legal rules to be reconciled to the greatest extent possible or for the Model Law to be adopted for both domestic and international credit transfers.

Territorial scope of application

13. Since the Model Law is being prepared for international credit transfers, questions of conflict of laws naturally arise. The relevant provisions are contained in article 15. Article 15(1) has the effect of limiting the territorial application of the Model Law.

Consumer transfers

14. The Working Group decided at its eighteenth session that the Model Law should apply to all international credit transfers, including transfers made for consumer purposes. Not only would that preserve the basic unity of the law, it would avoid the difficult task of determining what would be a credit transfer for consumer purposes. That was also thought to be of importance since special consumer protection legislation affecting credit transfers currently exists, and could be envisaged in the future, in only some of the countries that might consider adopting the Model Law.

15. At the same time, it was recognized that the special consumer protection legislation that exists in some countries, and that may be adopted in others, could be expected to affect some international credit transfers as well as domestic credit transfers. To accommodate that possibility, the footnote to article 1 was adopted to indicate that the Model Law would be subject to any national legislation dealing with the rights and obligations of consumers, whether the provisions of that legislation supplemented or contradicted the provisions of the Model Law (A/CN.9/318, paras. 30 to 33). The footnote was reconsidered at the twentieth session where no change was made (A/CN.9/329, para. 24).

16. At the twenty-first session the Working Group decided that the footnote should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers (A/CN.9/341, para. 65). It may be noted that consumers who are originators or beneficiaries of credit transfers have the same rights, obligations and protections under the Model Law as do all other originators and beneficiaries. No text was adopted to implement the Working Group's decision. The Working Group may wish to consider the following text:

> "This Law does not deal with issues related to the protection of consumers as a special class of [bank customers] [originators and beneficiaries]."

Comparison with Article 4A

17. Article 4A applies to both domestic and international credit transfers that fall within its scope of application based upon the conflict of laws rules in Article 4A-507. For a discussion, see comments 1 to 10 to article 15.

18. Article 4A-108 excludes from the coverage of Article 4A any transfer that is governed by the Electronic Fund Transfer Act of 1978. While that exclusion covers almost all transfers by or for the benefit of consumers, it does not exclude the relatively rare transfers made for consumer purposes that use the facilities of CHIPS, FEDWIRE or of the Society for Worldwide Interbank Financial Telecommunication (SWIFT).

Article 2. Definitions

For the purposes of this Law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a designated person. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order.

(b) "Payment order" means an unconditional instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if:

(i) Deleted

(ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) the instruction is to be transmitted either directly to the receiving bank, or to an intermediary, a funds transfer system, or a communication system for transmittal to the receiving bank.

(iv) Deleted

(c) "Originator" means the issuer of the first payment order in a credit transfer.

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders.

(g) A "receiving bank" is a bank that receives a payment order.

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(j) "Authentication" means a procedure established by agreement to determine whether all or part of a payment order [or a revocation of a payment order] was issued by the purported sender.

(k) "Execution date" means the date when the receiving bank is to execute the payment order in accordance with article 9.

(l) "Payment date" means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary.

Prior discussion

A/CN.9/297, paras. 24 to 28
A/CN.9/317, paras. 26 to 47
A/CN.9/318, paras. 35 to 59, 75, 76, 94 and 106
A/CN.9/328, paras. 79 and 88
A/CN.9/329, paras. 26 and 82
A/CN.9/341, paras. 66 to 84

Comments

1. The Working Group at its sixteenth session expressed the view that, in order to harmonize to the greatest extent possible the terms as used by bankers and as used in legal rules governing credit transfers, an effort should be made to use the terminology adopted by the Committee on Banking and Related Financial Services of the International Organization for Standardization in ISO 7982-1 (A/CN.9/297, paras. 25 to 28). However, in view of the fact that the ISO terminology had not been adopted with legal considerations in mind, some deviation from both the terminology and the definitions had to be envisaged. Various definitions have been considered at the seventeenth, eighteenth, nineteenth, twentieth and twenty-first sessions.

2. The comments below indicate the extent to which the terms used and their definitions differ from those in ISO 7982-1.

Chapeau

3. At the twentieth session the Working Group decided to introduce article 2 with the words "For the purposes of this Law", especially since some of the terms such as "bank" may be defined in other ways in the statutory law of a State that adopts the Model Law (A/CN.9/329, para. 26).

"Credit transfer"

4. The definition as adopted by the Working Group at its eighteenth session was based upon the definition of "funds transfer" in ISO 7982-1. However, certain amendments were made to the ISO definition in order to clarify its meaning. (See A/CN.9/318, paras. 36 to 38 and A/CN.9/WG.IV/WP.44, article 2, comments 4 to 6.)

5. At the twentieth session the Working Group adopted the current definition. When doing so it recognized that the definition of "credit transfer" and the associated definition of "payment order" were of particular importance since article 1 on the sphere of application provided that the law applied to credit transfers (A/CN.9/329, paras. 27 to 33). Therefore, the definition of the term serves in part to determine the sphere of application of the Model Law.

6. A credit transfer is defined in terms of the actions taken in regard to payment orders, and not in terms of the movement of funds as in an earlier definition. The types of transfers to be covered by the Model Law are also affected by the definition of "payment order".

7. The definition of "credit transfer" as adopted at the twentieth session included in square brackets a third sentence that provided when the credit transfer is completed (A/CN.9/329, para. 33). At the twenty-first session the sentence was deleted in view of the adoption of a provision on completion of a credit transfer in article 14(2 bis) (A/CN.9/341, para. 72).

8. Comparison with Article 4A The definition of "credit transfer" is almost identical to the definition of "funds transfer" in Article 4A-104.

"Payment order"

9. In accordance with a suggestion made at the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term submitted to the eighteenth and nineteenth sessions (A/CN.9/317, para. 54). At the nineteenth session the drafting group separated the definition into two elements, a definition in article 2 and the requirements as to the minimum data elements in a payment order in article 3 (A/CN.9/328, para. 145 and annex).

10. At the twentieth session of the Working Group the minimum data elements in a payment order as set out in article 3 were deleted from the draft Model Law (A/CN.9/329, paras. 89 to 93). Nevertheless, the existence of an incomplete payment order has consequences in regard to the credit transfer. Those consequences are considered in articles 5 to 8.

11. The basic elements of the current definition of "payment order" were adopted at the twentieth session to accord with the new definition of "credit transfer" adopted at that session (A/CN.9/329, paras. 34 to 58).

12. It was decided not to make any reference to the form in which the payment order might exist, i.e. written, oral or magnetic, or to the form in which it might be transmitted from the sender to the receiving bank. On the one hand, any listing might exclude new technological advances. On the other hand, in some countries restrictions on the use of particular forms for the existence or transmission of a payment order might be of a regulatory nature. In the absence of any provision on this point in the Model Law, it would be settled under other applicable provisions of national law.

13. At the twentieth session the Working Group agreed that the Model Law should not govern conditional payment orders that were to be sent from one bank to another, and decided that such orders would not be considered to be "payment orders" (A/CN.9/329, paras. 40 to 42 and 50 to 53). However, a conditional payment order issued by the originator was a "payment order" according to subparagraph (i) if the condition was to be satisfied on or before the issue of a payment order by the originator's bank. Consequential provisions were included to assure that the condition would not affect subsequent receiving banks or the beneficiary. In addition, subparagraph (iv) provided that an instruction to open a letter of credit was not a payment order, a provision that was thought to be necessary in view of the conditional nature of such an instruction.

14. Nevertheless, opposition was expressed at the twentieth session to even such a restricted recognition of conditional payment orders as falling within the sphere of application of the Model Law. It was noted that article 5(1) did not give the originator's bank any extra time within which to consider whether it wished to be bound by a conditional payment order before the bank was deemed to have accepted the order (A/CN.9/329, para. 52).

15. At the twenty-first session the Working Group decided that a conditional payment order should not be considered to be a payment order under the Model Law (A/CN.9/341, para. 73). That result was achieved by inserting the word "unconditional" in the chapeau of the definition and by deleting subparagraph (i). In addition, subparagraph (iv) was deleted as being unnecessary (A/CN.9/341, para. 79).

16. The Working Group recognized that, by saying that a conditional payment order was not a payment order under the Model Law, the sender of that order was not an originator and, consequently, had no rights or obligations under the Model Law. Therefore, if the credit transfer was not carried out properly for reasons unconnected with the original condition, any rights the customer might have would arise from rules of law outside the Model Law. Consequently, the Working Group decided that a provision should be included in the Model Law giving the sender of a conditional payment order the rights of an originator of a credit transfer where the execution of the conditional payment order eventually resulted in an unconditional credit transfer (A/CN.9/341, paras. 74 and 75). In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested the following addition to the definition of "originator" in article 2(c) in implementation of that decision:

> "or, where the first payment instruction is not a payment order because it is subject to a condition which subsequently is satisfied, the issuer of that instruction."

17. The delegation of the United Kingdom pointed out, however, that the conditional instruction would still not be a "payment order", which could give rise to difficulties in the interpretation of expressions such as "originator's payment order". As a consequence, while it stated its reluctance to include any reference to conditional instructions, it suggested that an approach preferable to the one decided by the Working Group would be to add the following at the end of the definition of "payment order":

> "Where an instruction is not a payment order because it is issued subject to a condition, and the condition is subsequently satisfied, the instruction shall be treated as if it had been unconditional when it was issued; but this shall not affect the rights or obligations of any person in respect of the instruction during the period before the condition was satisfied."

18. At the twenty-first session deletion of subparagraph (ii) was suggested on the grounds that the question of reimbursement of the receiving bank should be left for the originator and its bank to agree upon on a contractual basis. However, the subparagraph was retained on the grounds that it was necessary in order to exclude debit transfers from the scope of the Model Law (A/CN.9/341, para. 76).

19. Subparagraph (iii) is also intended to draw a distinction between debit transfers and credit transfers. A proposal at the twenty-first session to delete the subparagraph received no support. Various drafting proposals were made both before the twenty-first session (A/CN.9/WG.IV/WP.46, comment 16 to article 2) and during the session (A/CN.9/341, paras. 77 and 78) intended to make sure that the subparagraph could in fact apply only to a credit transfer.

20. It would seem that the distinction between a payment order that forms part of a credit transfer and an instruction that forms part of a debit transfer is that in the former case the instruction is transmitted by the sender to the receiving bank while in the latter case it is transmitted by the sender to the beneficiary, who in turn transmits it to the receiving bank. In both credit and debit transfers the transmission to the receiving bank may be made directly or the services of an intermediary may be used. However, it would seem that the meaning should be sufficiently clear if subparagraph (iii) were to provide

> "the instruction is to be transmitted by the sender to the receiving bank"

or, in order specifically to exclude debit transfers,

> "the instruction is to be transmitted by the sender to the receiving bank by any intermediary other than the beneficiary".

21. Comparison with Article 4A Article 4A-103 defines "payment order" in substantially similar terms.

"Originator"

22. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth, eighteenth and twentieth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41; A/CN.9/329, para. 59). Under the definition a bank that issues a payment order for its own account is an originator.

23. In comment 16 it is suggested that the following words be added to the definition in implementation of the decision that the sender of a conditional payment order that results in an unconditional credit transfer should be considered to be the originator of the transfer:

> "or, where the first payment instruction is not a payment order because it is subject to a condition which subsequently is satisfied, the issuer of that instruction."

24. Comparison with Article 4A Article 4A-104(c) defines "originator" in almost identical terms to the current text. "Originator's bank" (which is not defined in the Model Law) is defined in Article 4A-104(d) to include "the originator if the originator is a bank". That is inconsistent with the Model Law, though the inconsistency probably does not have any substantive consequences in light of the current sphere of application in article 1 of the Model Law.

"Beneficiary"

25. The definition differs from the wording of ISO 7982-1 in that the beneficiary is the person named as beneficiary in the originator's payment order and a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42; A/CN.9/329, para. 69). For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 8(5). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

26. Comparison with Article 4A Article 4A-103(2) defines "beneficiary", while "beneficiary's bank" (not defined in the Model Law) is defined in 4A-103(3). The definitions seem to be generally consistent with the usage in the Model Law.

"Sender"

27. The Working Group decided at its seventeenth and eighteenth sessions that the term should include the originator as well as any sending bank (A/CN.9/317, para. 46; A/CN.9/318, para. 44; see also A/CN.9/329, para. 61). ISO 7982-1 defines "sending bank" as the "bank that inputs a message to a service" but it has no term that includes the originator as a sender. Such a term is not necessary in the context of ISO 7982-1.

28. Comparison with Article 4A Article 4A-103(5) defines "sender" consistently with the Model Law.

"Bank"

29. The Working Group at its eighteenth session agreed to use the word "bank" since it was short, well-known and covered the core concept of what was intended (A/CN.9/318, para. 46; but see comments 37 and 38). The definition in the Model Law will necessarily differ from that used in national legislation since there are different definitions in various countries and in some countries there are two or more definitions for different purposes.

30. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group at its eighteenth session was of the view that the test as to whether a financial institution should have the rights and obligations of a bank under the Model Law should depend on whether "as an ordinary part of its business it engaged in credit transfers for others", rather than whether it engaged in the totally unrelated activity of taking deposits (A/CN.9/318, para. 50). As a result, some individual financial institutions that would not normally be considered to be banks, such as dealers in securities that engage in credit transfers for their customers as an ordinary part of their business, would have been considered to be banks for the purposes of the Model Law under the definition adopted at the eighteenth session.

31. The Working Group at its twentieth session made three changes in the definition (A/CN.9/329, paras. 62 to 68). First, it replaced the words "financial institution" by the word "entity". It was said that the Model Law was intended to govern a service and not particular systems. The change in the definition was specifically intended to bring under the Model Law those post offices that provide a service for the execution of payment orders, even though they may otherwise be governed by different rules because of their administrative status. That position was reaffirmed at the twenty-first session, despite some continuing opposition (A/CN.9/341, para. 66).

32. A second change made at the twentieth session was that the definition focuses on the execution of payment orders rather than, as it had previously, on whether the entity engages in credit transfers. At the twenty-first session the Working Group decided that the definition of a bank should not be extended to cover entities that only occasionally executed payment orders (A/CN.9/341, para. 69).

33. A third change made at the twentieth session was that the words "and moving funds to other persons" were added, but those words were placed in square brackets by the drafting group. At the twenty-first session it was said that the words should be retained so as to exclude message systems from the definition of a "bank". However, it was decided to delete the words in square brackets and to add a second sentence to state specifically that entities that merely transmitted payment orders were not banks (A/CN.9/341, para. 68).

34. It is clear that the Working Group's decision was intended to exclude the postal authorities from the definition of "bank" when they were exercising their function of operating a public message system such as telex, but not when they were exercising their function of operating a credit transfer system. It is also clear that the policy decision was to extend to all similar message systems, which presumably included clearinghouses. However, it is not clear that the decision can be adequately implemented by a new second sentence that says "Entities that merely transmit payment orders are not banks."

35. A message system such as telex "merely" transmits messages, but a message system such as SWIFT gives value-added services. Even more services are given by a clearinghouse, such as CHAPS or CHIPS. In some clearinghouses, such as the Swiss Interbank Clearing (SIC), an account is opened each morning for each participating bank by transfer from the bank's reserve account with the Swiss National Bank. Payment orders sent by the bank through SIC are debited to the account while payment orders received by SIC for the account of the bank are credited to the account. The rules governing SIC do not permit a debit balance in an account at any time, thereby excluding any financial risk to other participating banks if one of the banks should be closed during the day because of its insolvency. It would seem that the suggested new sentence would not exclude any of those entities, other than the telex service, from the definition of "bank". Moreover, there is the danger that the sentence would suggest that a message system that did more in respect of a payment order was a bank. That might be particularly so for SIC and any other clearinghouse that established accounts for the debiting and crediting of payment orders sent and received by participating banks. (See comment 44 to article 4.) The Secretariat is unable to suggest any other wording that would accomplish the desired purpose without creating other possibilities of misunderstanding. Therefore, it suggests that the current text without a second sentence is the most likely to be properly interpreted.

36. Comparison with Article 4A Article 4A-105(2) defines a "bank" as "a person engaged in the business of banking" and goes on to list several types of institutions that are included.

Proposed new term for "bank"

37. At the twenty-first session the Working Group requested the Secretariat to reconsider the possibility of using a word other than "bank" and to report to the twenty-second session (A/CN.9/341, para. 70). The Working Group recognized that any word chosen would need to serve in such compound terms as "receiving bank".

38. It would seem that if an alternative term were chosen that had an existing well understood meaning, the problems that are seen in connection with the use of the word "bank" would arise in connection with the alternative term. That is particularly so since the term would be used in six official languages and may be translated into a number of other languages when the Model Law is used as the basis for national legislation. It is suggested that a new term associated with the subject matter of the Model Law might be created. The term the Secretariat would suggest would be "credit transfer institution". The term has the disadvantage of being long, especially when compared with the word "bank". However, it has the advantage of combining well with the modifiers used in the Model Law, i.e., sending, receiving, originator's, intermediary, and beneficiary's.

Proposed definition of "branch"

39. An earlier version of the definition of "bank" provided that "for the purposes of these Rules a branch of a bank is considered to be a separate institution." At the eighteenth session of the Working Group the sentence was deleted and it was decided that consideration would be given in each of the substantive articles whether branches should be treated as banks (A/CN.9/318, para. 54). Paragraphs indicating that branches of a bank are considered as separate banks have been added to articles 1(2), 6(7), 9(5) and 10(9) (A/CN.9/318, paras. 53 and 54; A/CN.9/328, paras. 82 and 110; A/CN.9/329, para. 141).

40. At the twenty-first session it was suggested that the Model Law should contain a definition of a "branch" of a bank (A/CN.9/341, para. 71). It was said that under some national laws "branches" were defined in a restrictive way that would not cover certain offices or agencies of a bank that might be intended to be treated as separate banks under the Model Law. It was proposed that the significant feature of a "branch" under the Model Law should be that it sent and received payment orders. That proposal was objected to on the ground that the sending and receiving of payment orders were acts that could be carried out by simple message carriers. The delegation that had raised the question was invited, if it so wished, to prepare a draft definition and submit it to the twenty-second session. In the absence of any draft definition that might be submitted by the delegation, the Working Group might consider that the desired result would be achieved if articles 1(2), 6(7), 9(5) and 10(9) were to read "branches or separate offices of a bank are considered to be separate banks", as appropriately modified for the context.

41. Comparison with Article 4A Article 4A-105(2) provides that "A branch or separate office of a bank is a separate bank for purposes of this Article."

"Receiving bank"

42. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. Such a bank must react to the fact of having received the order. (The problem of misdirected payment orders is addressed in articles 6(3) and 8(2).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank. It would not be appropriate to place upon it the obligation of a receiving bank in regard to a payment order that it did not know about.

43. Comparison with Article 4A Article 4A-103(4) defines a "receiving bank" as "the bank to which the sender's instruction is addressed", and not the bank that in fact receives the instruction. It is not clear whether that distinction is of significance in Article 4A. In most contexts the term "receiving bank" seems to include the beneficiary's bank, but in other contexts a distinction seems to be drawn between the two (e.g., Article 4A-301(a)).

"Intermediary bank"

44. The definition was proposed by the Working Group at its seventeenth session and modified at its twentieth session by the drafting group (A/CN.9/317, para. 41; A/CN.9/329, para. 72). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all receiving banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank (A/CN.9/329, paras. 70 and 71). See also comment 9 to article 1.

45. Comparison with Article 4A Article 4A-104(b) defines "intermediary bank" in almost identical terms to that in the Model Law.

"Funds" or "money"

46. The definition is modelled on the definition of "money" or "currency" contained in article 5(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of the Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

"Authentication"

47. The purpose of an authentication procedure is to permit the receiving bank to determine whether the payment order was issued by the purported sender. Even if the payment order was not authorized, the purported sender will be bound if the requirements of article 4(2) are met, including the requirement that "the authentication provided is a commercially reasonable method of security against unauthorized payment orders".

48. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems.

49. The definition differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order, even though most authentication techniques that rely upon the use of computers do both. That position was confirmed by the Working Group at its twentieth session because the problems of authentication of a payment order as to its source and verification of the accuracy of its contents were two different legal concepts. In respect of the source of a message, the basic rule in article 4(1) is that the purported sender is not bound by a payment order unless the order had in fact been issued or authorized by the purported sender. The concept of authentication and its use in article 4(2) served to describe situations in which the purported sender might be bound by a payment order in spite of the fact that the order had not been issued or authorized by that person. In respect of errors, the Working Group noted that the general rule was that the sender was bound by what was received by the receiving bank (A/CN.9/329, paras. 77 to 79) (although that conclusion is not specifically stated in the current draft of article 4(1) or of any other provision of the Model Law). The Working Group went on to say that if it was intended that the Model Law should relieve the sender of that responsibility because of the availability of a procedure agreed between the sender and the receiving bank that would detect errors in a payment order or corruption of the contents of a payment order, that intention should be set out separately in the Model Law. At the twenty-first session the Working Group decided that, in its discussion of article 4, it would consider issues having to do with verification that the contents of a payment order as received were the same as the contents of the payment order as sent (A/CN.9/341, para. 81). See comments 20 to 25 to article 4.

50. The Working Group was in agreement at its twentieth session that, if article 10 was retained, the definition of authentication should apply to the revocation of payment orders. However, since there was opposition to the basic scheme of article 10, the words "or a revocation of a payment order" were placed in square brackets (A/CN.9/329, paras. 76 and 184 to 186).

51. The definition as adopted by the Working Group at its eighteenth session and modified at its twentieth session includes the provision that the authentication procedure is established by agreement; a procedure applied unilaterally by the receiving bank does not qualify as an authentication (A/CN.9/318, paras. 75, 76 and 94; A/CN.9/329, paras. 74 and 76). That agreement may be embodied in the rules of a clearinghouse or message system or it may be in the form of a bilateral agreement between the sender and the receiving bank. Under article 4(2) the authentication procedure must be

"commercially reasonable" in order for a purported sender to be bound by an unauthorized payment order; a sender cannot agree to be bound by a commercially unreasonable procedure (see article 4, comments 7 to 9).

52. Comparison with Article 4A Article 4A-201 defines "security procedure" in terms that are similar to the definition of "authentication", except that it applies as well to a procedure for the purpose of "detecting error in the transmission or the content of the payment order or communication." The provision goes on to give several examples of what the security procedure may require, and specifically states that comparison of a signature is not by itself a security procedure.

"Execution date"

53. There is no equivalent term in ISO 7982-1, except to the extent that the term "value date", i.e., "the date on which the funds are to be at the disposal of the receiving bank", is intended to be used in a payment order to indicate the date when the receiving bank is to execute the order (see A/CN.9/341, para. 82).

54. The execution date is the date when a given payment order is to be executed by the receiving bank and not the date the receiving bank did execute it, if those dates are not the same. See comments 27 and 28 to article 4. Since a credit transfer may require several payment orders, each of those payment orders may have an execution date, and the execution dates may be different.

55. The Working Group at its eighteenth and nineteenth sessions engaged in an extensive effort to define properly the term "execution date", especially in connection with its use in article 9 (A/CN.9/318, paras. 104 to 106; A/CN.9/328, paras. 76 to 91; see also A/CN.9/WG.II/WP.44, article 2, comments 27 to 31 where the earlier discussion is summarized). The current definition was adopted by the Working Group at its twentieth session (A/CN.9/329, paras. 81 and 182). As to the date when article 9 requires the receiving bank to execute the payment order, see article 9, comments 5 and 12.

56. The current draft of the Model Law does not define what constitutes execution of the payment order by the receiving bank. A proposal at the twenty-first session to add such a definition did not receive sufficient support (A/CN.9/341, para. 80). When the bank is not the beneficiary's bank, an order can be assumed to be executed when the receiving bank issues a payment order intended to carry out the order received (compare article 5(2)(d) with article 6(2)). When the receiving bank is the beneficiary's bank, execution is probably best understood as acceptance of the order in any of the ways specified in article 7(1). If the sender wishes to specify when the funds are to be placed at the disposal of the beneficiary, a "payment date" should be specified. The term "execute" in one of its various forms is used throughout the draft Model Law in connection with payment orders. In addition, in article 12(2) reference is made to execution of the credit transfer, and a definition is there given of that concept.

57. Comparison with Article 4A Article 4A-301(b) defines "execution date" substantively the same as in the current text. Article 4A-301(a) defines "execution" in respect of a bank that is not the beneficiary's bank. In contrast to the usage in the Model Law, Article 4A-301(a) goes on to say that

"A payment order received by the beneficiary's bank can be accepted but cannot be executed." That difference in the formal statement seems to lead to no differences in substance between Article 4A and the Model Law.

"Payment date"

58. At the twenty-first session the question was raised whether the Model Law should contain any rules covering the use of a payment date and, consequently, whether there was any need for a definition (A/CN.9/341, paras. 82 and 83). It was noted that the payment messages used by SWIFT did not contain a field for such a date and, it was stated, ISO would delete any reference to a pay (or payment) date in its next revision of its standards. It was said that the date commonly used on payment orders between banks was the value date, i.e., the date on which the funds were to be available to the receiving bank. The suggestion that the term "execution date" could be made to serve the intended function of payment date was not adopted on the grounds that, even though payment orders used in interbank practice might not provide for the designation of a payment date, the original payment order sent by the originator to its bank might stipulate that the funds were to be paid to the beneficiary on a particular date.

59. At the twenty-first session the Working Group changed the term "pay date", that it had previously been using to indicate when the funds were to be placed at the disposal of the beneficiary, to "payment date" (A/CN.9/341, para. 83). With that change the terminology used in the Model Law is now in conformity with Article 4A but out of harmony with ISO 7982-1, since the term "pay date" is used by ISO 7982-1 to indicate the date when the funds are to be available to the beneficiary. ISO 7982-1 uses the term "payment date" to indicate the date when a payment was executed. The term "payment date" was included in the text prior to the seventeenth session of the Working Group with the same meaning as in ISO 7982-1 but, since it was not used further, it was deleted in the revision by the Secretariat submitted to the eighteenth session.

60. The definition of "payment date" differs from pay date in ISO 7982-1 in that in the latter the pay date is the "date on which the funds are to be available to the beneficiary for withdrawal in cash". In the Model Law definition the payment date is the date "when the funds are to be placed at the disposal of the beneficiary". (See A/CN.9/317, para. 43 and A/CN.9/341, para. 83) The definition leaves open the question when and under what circumstances funds are placed at the disposal of the beneficiary, but they may be at the disposal of the beneficiary even though they are not available for withdrawal in cash. The most obvious example is when the transfer is in a unit of account that may be at the disposal of the beneficiary for further transfer in that form but not available in cash either as a unit of account or, perhaps, even in the local currency.

61. At the twenty-first session the definition was modified to make it clear that the payment date binding on the receiving bank is the date specified in the payment order received by it. See A/CN.9/WG.IV/WP.46, comment 37 to article 2 and A/CN.9/341, para. 83. If a payment date specified in a payment order received by an intermediary bank or the beneficiary's bank is not in conformity with the payment date specified by the originator, the bank where the change in dates occurred would be responsible for the error. For the significance of a payment date in a payment order prior to the one received by the beneficiary's bank, see article 9, comment 17.

62. At the twenty-first session the Working Group was in agreement that the question should be reconsidered together with articles 9 and 12 and, therefore, it adopted the current text as an interim draft (A/CN.9/341, para. 84). See comment 18 to article 9.

63. Comparison with Article 4A Article 4A-401 has a broader definition of "payment date" in that it is "the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank." Presumably the day is the day specified in the payment order received and not the day specified in the originator's payment order. The official comments indicate that the payment date may be expressed in various ways, presumably including the use of a type of credit transfer system that has a fixed time schedule of a certain number of days to process payment orders.

Article 3. Contents of payment order

(Deleted)

Prior discussion

A/CN.9/297, paras. 37 and 38
A/CN.9/317, paras. 49 to 68
A/CN.9/329, paras. 87 to 93
A/CN.9/341, para. 85

Comments

1. Article 3 of the draft Model Rules prepared by the Secretariat and submitted to the seventeenth session of the Working Group was entitled "form and content of payment order". In the light of the discussion at that session (A/CN.9/317, paras. 49 to 68), the substance of paragraphs (1) and (2) of article 3 were included in the definition of "payment order" in the redraft prepared for the eighteenth session of the Working Group. In particular, in accordance with a suggestion made in the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term (A/CN.9/317, para. 54). Inclusion of the minimum required data elements in the Model Law was expected to have an educational function.

2. At the nineteenth session the drafting group decided to delete the minimum required data elements from the definition of a payment order, since a message might be considered not to be a payment order if any one of the listed data elements was omitted (A/CN.9/328, para. 145; see A/CN.9/WG.IV/WP.41, article 2, comment 18), and to set out the required minimum data elements in article 3.

3. At the twentieth session the Working Group considered whether additional data elements should be made mandatory, and particularly information on cover and the identification of the originator and the originator's bank (A/CN.9/329, paras. 87 and 88). At the end of the discussion the Working Group decided to delete article 3 entirely (A/CN.9/329, para 93). Problems of incomplete instruments are now considered in articles 6(4) and 8(3).

4. The Working Group also decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer (A/CN.9/329, para. 93 and A/CN.9/341, para, 85).

CHAPTER II. DUTIES OF THE PARTIES

Article 4. Obligations of sender

(1) A purported sender is bound by a payment order [or a revocation of a payment order] if it was issued by him or by another person who had the authority to bind the purported sender.

(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders, and

(b) Deleted

(c) the receiving bank complied with the authentication.

(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(4) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed.

Prior discussion

A/CN.9/297, paras. 39 to 45 and 69
A/CN.9/317, paras. 57, 69 to 79 and 84
A/CN.9/318, paras. 70 to 109
A/CN.9/329, paras. 94 to 111
A/CN.9/341, paras. 86 to 103

Comments

1. Paragraphs (1) to (3) set forth the situations in which a purported sender of a payment order is bound by the order. Paragraph (4) sets forth the only obligation of the sender in regard to a payment order on which it is bound, i.e. to pay the receiving bank for it.

Paragraph (1)

2. Paragraph (1) states the basic rule that a purported sender is bound by a properly authorized payment order. The question whether the actual sender was authorized to bind the purported sender will be determined in accordance with the applicable law and will not be determined by the Model Law. Moreover, at

the twenty-first session it was decided that the question as to the law of which jurisdiction would be applicable would not be determined by article 15 (A/CN.9/341, paras. 46 and 47; see also comment 10 to article 15).

3. Pursuant to the words "or revocation of a payment order" the purported sender is also bound by a properly authorized revocation of a payment order. Those words have been placed within square brackets subject to a determination whether article 10 will be retained (A/CN.9/329, para. 96).

4. Comparison with Article 4A Article 4A-202 provides an essentially identical rule to that in paragraph (1).

Paragraph (2)

5. Paragraph (2) has been drafted as an exception to paragraph (1), but from the viewpoint of banking operations it provides the basic rule. In almost all cases a payment order must be authenticated. Proper authentication indicates proper authorization and the receiving bank will act on the payment order. Even if the payment order was not properly authorized under paragraph (1), the purported sender is bound by the order if the requirements of paragraph (2) are met (see A/CN.9/341, para. 86).

6. The Working Group may wish to consider deleting the words "When a payment order is subject to authentication" in the *chapeau* of paragraph (2). Those words were part of a technical amendment made at the twenty-first session to overcome the possible interpretation of paragraph (2), contained in the draft then before the Working Group, that even if the payment order had been authorized under paragraph (1), the sender was bound only if the requirements of paragraph (2) were also met (A/CN.9/341, para. 86; see A/CN.9/WG.IV/WP.46, comment 9 to article 4). The opening words do not seem to be necessary to achieve the result desired at the twenty-first session. However, they leave open the question as to when a payment order is subject to authentication, a question that does not need to be raised.

7. The first requirement, set out in subparagraph (a), is that the authentication provided is commercially reasonable. The discussion in the eighteenth session of the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication it was prepared to receive from the sender (A/CN.9/318, para. 75). Therefore, it was the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. If the receiving bank was willing to accept a payment order even though there was no commercially reasonable authentication, it should accept the risk that the payment order had not been authorized in accordance with paragraph (1) (A/CN.9/341, para. 94).

8. At the eighteenth session the Working Group was in agreement that the sender and the receiving bank could not provide for a lower standard by agreement (A/CN.9/318, para. 75). At the twenty-first session the Working Group noted that at that session it had adopted a new article 16 that stated a general principle of freedom of contract unless otherwise provided in the Model Law, and that it had decided to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained (A/CN.9/341, para. 93). Consequently it decided to include in paragraph (2) a provision to the effect that parties would not be allowed

to agree on the use of an authentication procedure that was not commercially reasonable (A/CN.9/341, para. 96). That decision might be implemented by the addition of a new sentence that would read as follows:

"The provisions of this paragraph may not be varied by agreement."

9. No attempt has been made to set a standard as to what constitutes a commercially reasonable authentication procedure. The standard would be objective, since it would be one from which the parties were not free to vary by agreement. However, since the commercial reasonableness of an authentication procedure would depend on factors related to the individual payment order, including such factors as whether the payment order was paper-based, oral, telex or data transfer, the amount of the payment order and the identity of the purported sender, the statement of the parties in their agreement that they chose to use a procedure that was less protective than others available, especially if they explained the reasons why they had made that decision, could be expected to influence a court as to whether the standard chosen was commercially reasonable. It could be expected to be of particular importance that the receiving bank offered the sender at a reasonable price another authentication procedure that clearly was commercially reasonable, but the sender chose to use the less secure procedure for reasons of its own. The standard as to what was commercially reasonable could be expected to change over time with the evolution of technology. At the twentieth session of the Working Group it was suggested that, in view of the imprecision of the term "commercially reasonable" and the unfamiliarity of many legal systems with the concept, any commentary that might be written to accompany the Model Law when it is adopted by the Commission might give a suggestion as to factors to be taken into account (A/CN.9/329, para. 98).

10. A previous requirement, that had been set out in subparagraph (b), was that the amount of the payment order was covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank. That rule was said to afford a protection for originators in some countries. By limiting the amount that could be debited to an account, a customer could limit the amount of potential loss. Such a limitation also furnished to a limited degree an indication that an excessively large payment order might have been in error or fraudulent (A/CN.9/318, paras. 82 and 85 to 87; A/CN.9/329, paras. 100 and 101).

11. At the twentieth session a proposal to delete subparagraph (b) was rejected (A/CN.9/329, paras. 100 and 101). At the twenty-first session it was again proposed to delete the subparagraph (A/CN.9/341, paras. 87 to 91). The principal argument against the provision was that it was impractical from an operational point of view since banks could not monitor the accounts of senders on a real-time basis unless all the debits and credits that were chargeable to the account were entered on a real-time basis. It was said that in even the most highly automated banks some types of payment orders were processed in batch with the resulting debits and credits entered to the accounts periodically, and often at the end of the working day. In reply it was said that the rule in subparagraph (b) was a risk allocation rule and not an operational rule. The first decision made by the Working Group at the twenty-first session was to limit the application of subparagraph (b) to non-bank senders. Subsequently, in connection with its discussion of paragraph (3), it decided to delete subparagraph (b) (see comments 16 and 17).

12. What was the third, but is now the second, requirement is that the receiving bank complied with the authentication. If the bank complied with the authentication but the sender had not, the bank would know that the payment order had not been authenticated by the sender and should reject it. However, even if the bank did not comply with the authentication but the payment order was in fact authorized, the purported sender would be bound under paragraph (1). The one occasion when subparagraph (c) would be truly dispositive would be in the case envisaged by paragraph (3), i.e., where an unauthorized payment order was properly authenticated by the actual sender but the receiving bank did not comply with the authentication procedure. In that case the sender would not be bound under paragraph (2) and there would be no occasion to turn to paragraph (3).

13. Comparison with Article 4A Article 4A-202(b) provides essentially an identical rule with additional detail. Subparagraph (c) of Article 4A-202 gives an indication as to what would be "commercially reasonable".

Paragraph (3)

14. The paragraph was prepared in two versions at the eighteenth session of the Working Group (A/CN.9/318, paras. 88 to 90). In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured variant A. Placing the major risk on the receiving bank was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 7). In general, those who were in favour of placing the major risk on the sender favoured variant B. Placing the major risk on the sender was said to be appropriate because it was the sender who chose the means of transmission of the particular payment order. Moreover, variant B would act as an incentive to senders to protect the authentication or encryption key in their possession.

15. The paragraph was discussed again at the twentieth session where several new proposals were made (A/CN.9/329, paras. 103 to 108). However, because of the failure to reach agreement, the Working Group left the text unchanged.

16. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 97 to 101). Paragraph (3) deals with the relatively rare case when there has been an unauthorized payment order that was authenticated in accordance with paragraph (2) but was not authorized in accordance with paragraph (1). In such a case paragraph (3) provides that the purported sender must show that the payment order resulted from the actions of a person other than a present or former employee of the purported sender in order not to bear the loss. In order to meet that burden it would not be necessary to show who had sent the payment order; the fact that it could not have resulted from the actions of a present or former employee might be proved by other means. Once that burden has been met by the purported sender, the receiving bank must show that the authentication was procured by the fault of the purported sender in order to place the loss back on the purported sender.

17. With adoption of the new version of paragraph (3), the Working Group decided to delete paragraph (2)(b) (see comment 11).

18. After an extensive discussion at the twenty-first session the Working Group decided that it would leave the parties free to vary the provisions of paragraph (3) by agreement, as provided in article 16. A suggestion was made that it should not be possible to vary the provisions to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (3) could be modified by agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank. The delegations that expressed strong reservations to the decision leaving the parties free to vary the provisions of paragraph (3) by agreement were concerned that the likelihood that the Model Law would be found acceptable by national legislatures would be seriously reduced.

19. Comparison with Article 4A Article 4A-203 is essentially the same as paragraph (3), but slightly more to the advantage of the receiving bank.

Errors in payment order or corruption of its contents

20. In the working paper submitted to the twentieth session of the Working Group suggestions were made as to how the authentication defined in article 2 and used in article 4 in respect of identification of the sender might also be used in respect of errors in a payment order or corruption of the contents of a payment order during its transmission (A/CN.9/WG.IV/WP.44, article 2, comment 23 and article 4, comment 10). The Working Group did not accept the suggestion that an authentication as defined should be used for both purposes. It said that, if it was intended that the Model Law should relieve the sender of the responsibility for the content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately in the Model Law (A/CN.9/329, para. 79). At the twenty-first session the Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session.

21. If it would be the desire of the Working Group to include such a rule, it would seem appropriate that it be in article 4 following current paragraph (3). The Working Group may wish to consider the following proposal:

> "A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for the detection of errors in a payment order, the sender is not bound by the payment order to the extent that use of the procedure by the receiving bank revealed or would have revealed the error."

22. The first sentence makes it clear that the sender bears the risk that the contents of the payment order as received by the receiving bank are not those intended to be sent, or those actually sent, by the sender. The discrepancy may have occurred as a result of an error by the sender or because the contents of the payment order changed after being sent. The second sentence sets out the occasions when the sender would not be bound to the terms of the payment order as received. A prerequisite is that the sender and the receiving bank had agreed on the use of a procedure that would reveal some or all of the errors in the payment order. In contrast to the authentication procedure, there would be no requirement that the procedure was commercially

reasonable, or that it was designed to reveal all errors. There is also no requirement that the procedure must require the sender to act; the only question is whether use of the procedure by the receiving bank in respect of the particular payment order received revealed the error or, if the receiving bank did not use the procedure, whether its use would have revealed the error. It is understood that the word "error" includes all discrepancies between the payment order as it was intended and the payment order as it was received, whatever be the source of the discrepancy. To some degree the proposed paragraph implements the same policy as do articles 6(3), (4) and (5) and 8(2), (3), (4) and (5) when the error in the payment order is in relation to the subject matter covered by those provisions. However, the proposed paragraph might most often be applicable to an error in the amount of money to be transferred when the amount was expressed only in figures.

23. Another wording has been suggested by the delegation of the United Kingdom as follows:

> "Where the sender has agreed with a receiving bank that a payment order will be subject to a procedure to detect errors, and the sender complies with the procedure, the sender shall not be bound by the payment order if the bank, had it also complied with the procedure, would have detected that
>
> > (a) the payment order instructed payment to a beneficiary not intended by the sender, or
> >
> > (b) was an erroneous duplicate of a payment order already sent by the sender.
>
> If the error the bank would have detected was that the sender instructed payment of an amount greater than that intended by the sender, the sender shall be bound only to the extent of the amount that was intended."

24. The delegation of the United Kingdom pointed out that the proposed new paragraph does not deal with erroneously misdirected payment orders, which are dealt with in articles 6(3) and 8(2), and suggested an amendment to its prior proposal in this regard. See comments 8 to 11 to article 6, comment 6 to article 8 and comments 10 and 11 to article 9.

25. Comparison with Article 4A Article 4A-205 gives results in respect of a "payment order ... transmitted pursuant to a security procedure for the detection of error" that are similar to the results in article 4(2) in respect of an unauthorized but authenticated payment order. If the transfer was made to an incorrect beneficiary or was a duplicate transfer, "the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution", while if the transfer was for too great an amount, the receiving bank could recover from the beneficiary "the excess amount received." To some degree the restitution provision in Article 4A-205 already exists in article 11(b), though article 11(b) permits each sender to recover from its receiving bank and not from the beneficiary. This difference in approach is explained in part by the fact that in principle the Model Law does not regulate the rights and obligations of the beneficiary.

Paragraph (4)

26. The distinction between creation of the obligation of the sender to pay the receiving bank when the receiving bank accepts the payment order and the maturing of the obligation to pay on the execution date is relevant when the execution date is in the future. The provision raises two separate problems: the obligation of the sender when the receiving bank fails to execute on the execution date and the obligation of the sender when the receiving bank accepts the payment order prior to the execution date.

27. At the eighteenth and twentieth sessions the use of the execution date as the date when the sender should be obligated to make the funds available to the receiving bank was questioned on the grounds that the execution date was defined in article 2(k) as the date the receiving bank was obligated to act and not the date the receiving bank had performed its obligation (A/CN.9/318, para. 104; A/CN.9/329, para. 109). At the twentieth session it was stated in reply that, while the sender should be obligated to pay on the execution date, the sender should receive interest under article 12 for the period of any delay by the receiving bank in executing the order. The latter suggestion appears to have been thought to have been the natural consequence of the text of the Model Law as currently drafted.

28. It can be doubted whether receiving banks will often accept payment orders for future execution prior to the execution date, unless the sender has already paid for the order. However, if the receiving bank executes the payment order prior to the execution date, it accepts the order at the time of its execution. While the sender can no longer revoke the order (article 10(1) and (2)), and becomes obligated to pay for it, the receiving bank may not debit the sender's account or otherwise require payment for the order until the execution date.

29. At the twentieth session it was stated that the sender's obligation to pay should extend only to the amount of the payment order and not to any costs or charges. That issue, however, was not resolved. Reference was made to the treatment of the issue in article 14(3) (A/CN.9/329, para. 110). Compare the discussion in regard to article 14(3) in comments 15 and 16 to article 14.

30. Comparison with Article 4A Article 4A-402(b) and (c) are essentially the same as the Model Law. Exceptions are stated to the duty of the sender to pay in case of erroneous payment orders of various types.

Concept of payment and netting

31. The current text of the Model Law does not contain any provision that indicates how and when a sender would pay for the payment order as it is required to do by paragraph (4). This lack of an indication as to how and when the sender pays for the payment order may cause problems in the implementation of articles 5(2)(a) and 7(1)(a) under which the receiving bank accepts a payment order by failing to give notice of rejection if, and only if, the receiving bank has received payment from the sender. The only relevant discussion has been in respect of netting.

32. At the nineteenth session the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law. The Working Group noted that important studies on this issue were taking place elsewhere, and particularly in a committee of the central banks

of the Group of Ten, presided by the General Manager of the Bank for International Settlements (BIS). Therefore, the Secretariat was requested to follow those developments and to report to the Working Group on the conclusions that had been reached, including the submission of a draft text for possible inclusion in the Model Law if that seemed appropriate (A/CN.9/328, paras. 61 to 65; see A/CN.9/WG.IV/WP.42, paras. 47 to 57). At the twenty first session the Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (A/CN.9/341, para. 53). Although it was expected that participants in the work of BIS on netting who were also participants in the Working Group would submit a text to the Secretariat for incorporation in this report, that has not been possible. Nevertheless, a few comments may be made on the concept of payment and on netting as it would affect the current text of the Model Law.

33. The normal means by which a sending bank pays the receiving bank for a high-value high-speed credit transfer is that the amounts being transferred are debited and credited to accounts held by the banks with one another or to accounts held with a third bank. That can give rise to any one of four situations:

(a) The sender has an account with the receiving bank. The receiving bank is paid by debiting that account. Since the receiving bank will debit the account only if the account has a credit balance, or if the receiving bank is willing to extend credit to the sender, it would seem reasonable for the receiving bank to be considered to be paid by the sender when the receiving bank debits the account.

(b) The receiving bank has an account with the sender. In such a case the sender would pay the receiving bank by crediting the receiving bank's account with the sender. Normally, the receiving bank should be considered to be paid when the account was credited, which could be prior to the sending of the payment order. However, the amount of the payment order by itself, or in conjunction with other payment orders sent by the sending bank, may be so large that it would create a credit balance larger than that which the receiving bank is willing to have with the sender. Therefore, it may be desirable to have a rule that payment is made in such a situation only when the receiving bank withdraws the credit (perhaps measured on a first-in first-out basis) or when a specified time has passed after the account was credited or after the receiving bank knew of the credit.

(c) The receiving bank receives credit in its account with a third bank. The situation would be essentially the same as when the receiving bank received credit with the sender and the same rules might apply.

(d) The third bank in which the receiving bank receives credit is the central bank or its equivalent. In such a case payment may be considered to have been made when the credit was entered to the receiving bank's account.

34. Netting is used when it is not possible or desirable for one reason or another to make payment by debiting and crediting the individual transactions to an account as described above. Netting is an arrangement by which a set of two or more transactions creating financial rights and obligations between two or more parties during a defined period of time or coming due at a defined point of time are settled by calculation and payment of the net amount due by the participant or participants who on balance have remaining obligations. Netting may be used as a technique to reduce the number of transaction messages between the participants without changing the legal nature of the individual obligations. This is often referred to as "position netting". Until final settlement is made between the participants by the transfer of a single net amount by the participant with the debit balance between them, each one owes to the other the gross amounts due on each individual transaction.

35. Netting may also be structured in such a way as to merge the individual legal obligations into a single legal obligation for the net amount. Such a transformation of the legal obligations usually depends upon the use of the concept of novation, though the concept of set-off may also be used in some legal systems. It is not clear in some legal systems whether, in case of the insolvency of one of the participants in the netting arrangement prior to settlement of the net amounts, the legal representative of the insolvent person (or of the creditors of the insolvent person) would be bound to recognize the netting arrangement or whether a claim could be made for the gross amounts due to the insolvent while the gross amounts due by the insolvent to the other participant or participants were recoverable only in the liquidation proceedings.

36. So-called "netting by close-out", where the future obligations between two banks are to be reduced to a single net obligation in case of the occurence of a defined event of default, such as the appointment of a receiver or liquidator of one of the banks, is relevant to forward exchange contracts but not to the payment system as such and need not be considered here.

37. In some types of financial transactions, such as the purchase and sale of currencies for future delivery, bilateral netting may take place. For example, when both of the two parties during the period in question buys and sells to the other party pounds against dollars, on the delivery date one of them will be obligated to deliver more pounds than that person has a right to receive and the other will be obligated to deliver more dollars than that person has a right to receive. The two parties may then agree to deliver only the net amounts of pounds in the one direction and the net amount of dollars in the other rather than for each to deliver to the other the gross amounts of both pounds and of dollars that they have sold.

38. Although high-value high-speed credit transfers are not normally settled by bilateral netting, bilateral netting is more often used when two banks interchange payment orders in bulk by the manual transmission of magnetic tapes or the like. While the legal consequences of debiting and crediting incoming and outgoing payment orders to an account are in many respects similar to those intended to be achieved by netting by novation, the mechanics and the legal concepts involved are different. Therefore, it may be desirable to have a provision on bilateral netting in the Model Law.

39. Comparison with Article 4A The provision on bilateral netting in the final version of Article 4A-403(c) is contained in the first two sentences of draft paragraph (3) as set out in A/CN.9/WG.IV/WP.42, para. 54.

40. Multilateral netting is a common feature in clearinghouses with delayed settlement, such as CHAPS and CHIPS. In such a clearinghouse the value of payment orders sent and received during the day by the participants are recorded by the clearinghouse. At the end of the day the net amounts due by each participant are calculated. The net calculation may be made first in respect of each bilateral relationship in the clearinghouse with the individual nets then being netted into a net-net amount. Alternatively, the net-net amounts may be calculated directly. The settlement would be effected by those banks that on the net-net basis had a debit balance transferring sufficient funds to a settlement account to cover their debit balance while those banks that had a net-net credit balance would receive that amount from the settlement account. The settlement account might be with the clearinghouse itself, but it is typically with the central bank.

41. The legal issues arising out of multilateral netting are of two types. First, payment of the sender to the receiving bank could be considered to have occurred when the payment order went through the clearinghouse, since the sending bank would at that time be debited in respect of the settlement to be made at the end of the day and the receiving bank would be credited. Payment to the sender could also be considered to have taken place only when the settlement at the end of the day is completed. The decision as to when payment is considered to have been made would be heavily dependent on the second issue, namely what happens if one of the banks with a net-net debit balance is unable to transfer to the settlement account sufficient funds to cover the outstanding debit balance. If the transfers that have been made through the clearinghouse must be reversed in whole or in part in order to permit the settlement to be completed in respect of the remaining transfers, it is logical to draw the conclusion that no sender has paid the receiving bank of any particular payment order until the settlement is complete. If no transfer is to be reversed upon the failure of a bank to meet its obligations in the settlement, either because the central bank or other adequate entity guarantees the settlement or because a loss-sharing arrangement between all participating banks is in place, it is logical to conclude that the receiving bank receives payment from the sender when it receives the payment order through the clearinghouse.

42. A provision in the Model Law in respect of multilateral netting might settle one or more of three separate issues:

(a) Whether, as a matter of law, the debits and credits arising out of the sending of payment orders through the clearinghouse are to be netted, and if they are, whether the netting is to take place on a bilateral basis between each pair of banks or whether it is to take place on a multilateral basis.

(b) Whether some or all of the payment orders that have been sent through the clearinghouse are to be reversed in case one of the participating banks is unable to meet its obligations in the settlement.

(c) The time when payment is considered to have been made by the sender to the receiving bank.

43. Comparison with Article 4A Article 4A-403(b), containing the provisions on multilateral netting, is set out in A/CN.9/WG.IV/WP.42, para. 54. Only minor editorial changes were made to that text in the finally adopted form. In addition, Article 4A-405(d) provides that a funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. For the rule to apply, it would not be necessary that the beneficiary's bank was the receiving bank of the order made through the funds-transfer system. Such a system rule would be most likely to be found in conjunction with a multilateral netting arrangement.

44. It should be noted that a payments clearing arrangement can be structured in such a manner that netting in the form discussed here is not necessary. An example is the Swiss Interbank Clearing (SIC), also discussed in comment 35 to article 2 in the context of the definition of a "bank". In SIC an account is opened each morning for each participating bank by transfer from the bank's reserve account with the Swiss National Bank. Payment orders sent by the bank through SIC are debited to the account while payment orders received by SIC for the account of the bank are credited to the account. The rules governing SIC do not permit a debit balance in an account at any time, thereby excluding any financial risk to other participating banks if one of the banks should be closed during the day because of its insolvency. In effect, from both an operational and, it would seem, a legal point of view SIC is in this limited context the equivalent of a correspondent bank of the sending and receiving banks. Therefore, the time of payment by the sending bank to the receiving bank would be governed as suggested in comment 33.

45. Comparison with Article 4A Article 4A-403 provides when a sender pays a receiving bank under the circumstances described above. It contains a detailed provision on netting that is designed to accommodate the new CHIPS rule that reduces the risk that the failure of one bank to settle will cause other banks to be unable to meet their settlement obligations.

Article 5. Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it gives notice to the sender of acceptance, or

(d) when it issues a payment order intended to carry out the payment order received.

(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51
A/CN.9/317, paras. 80 to 84
A/CN.9/318, paras. 110 to 120 and 126 to 134
A/CN.9/WG.IV/WP.42, paras. 7 to 16
A/CN.9/328, paras. 12 to 16
A/CN.9/329, paras. 112 to 127
A/CN.9/341, para. 53

Comments

1. The drafting group at the nineteenth session substantially restructured the portion of the draft Model Law dealing with acceptance of a payment order by a receiving bank and the statement of the obligations of a receiving bank. Under the new structure articles 5 and 6 deal with a receiving bank that is not the beneficiary's bank while articles 7 and 8 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2(g) in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 5 does not apply to a beneficiary's bank.

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept. Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

3. In order to help resolve the controversy, the Secretariat prepared a report for the nineteenth session of the Working Group that described the criteria for determining when a receiving bank had accepted a payment order and the consequences of acceptance (A/CN.9/WG.IV/WP.42, paras. 2 to 42). The matter was discussed at length by the Working Group at its nineteenth session, at the conclusion of which the Working Group decided to retain the use of the concept (A/CN.9/328, para. 52).

4. A proposal was made at the twentieth session to define the term "acceptance". The proposal received no support (A/CN.9/329, paras. 112 and 113).

Paragraph (2)

5. At the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 ... " (A/CN.9/341, para. 17).

Subparagraph (a)

6. The current text of subparagraph (a) was adopted at the twentieth session (A/CN.9/329, paras. 123 and 175). It is fundamentally a combination of paragraphs (1) and (2)(a) of the text as it emerged from the nineteenth session (A/CN.9/328, Annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the basic policy, first established at the eighteenth session, has remained unchanged.

7. Except for certain obligations of notification of error set out in articles 6 and 8, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, the expectation is that a receiving bank will execute a payment order it has received. Therefore, if the receiving bank does not accept the order, paragraph (3) provides that it is required to notify the sender of the rejection. (See comments 16 to 20.) If the required notice of rejection is not given, paragraph (2)(a) provides that the payment order is accepted.

8. One of the most difficult issues has been whether the receiving bank should have an obligation to give a notice of rejection when the reason that it has not executed the payment order is that it has not as yet received payment for it from the sender. In favour of such an obligation is that a notice of rejection informs a good faith sender that there is a problem that needs to be rectified, a problem that otherwise may be unknown. Failure to rectify the problem may have adverse consequences for the sender, for the originator, if the sender is not the originator, and for the beneficiary. Opposed to such an obligation of notification is the fact that in most cases the failure to receive payment is in fact only a technical delay that is automatically rectified. A notification of rejection, or even of non-receipt of payment without specifying that rejection will follow, will merely add to the message flow between banks and will itself lead to additional confusion. In any case, a sender is expected to know whether it has made adequate provision for paying the receiving bank, whether by debit of an account of the sender with the receiving bank or by credit of an account of the receiving bank with the sender or with a third bank.

9. The Working Group decided at the eighteenth session that the receiving bank should have no obligation to give the notice of rejection (the notice now called for by paragraph (3)) if one of its reasons for rejecting the payment order was insufficient funds (A/CN.9/318, para. 119). This led to discussions at the nineteenth and twentieth sessions as to what constituted insufficient funds, and whether any distinctions should be made between the different reasons why the funds were insufficient (A/CN.9/328, para. 15 and A/CN.9/329, paras. 119 to 122). The result was that the reference to insufficient funds was deleted from what is now paragraph (3) (A/CN.9/329, paras. 123 and 175).

Paragraph (2)(a) was amended to provide that even if a required notice of rejection was not given, the payment order is not accepted "until the receiving bank has received payment from the sender in accordance with article 4(4)." See comments 17 to 19 as to when a notice of rejection is required and comments 31 to 45 to article 14 as to when payment has been received.

10. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested the deletion of the words "in accordance with article 4(4)". It noted that those words gave rise to a circular problem since article 4(4) provides that the sender is obligated to pay the receiving bank only when the receiving bank accepts the payment order. The sender is always permitted to pay the receiving bank prior to acceptance, which is the situation envisaged in article 5(2)(a). See also the suggestion in respect of paragraph (3) in comment 19.

Subparagraph (b)

11. Paragraph 2(b) was originally in prior article 6(2)(a) and was applicable only to the beneficiary's bank. At the eighteenth session of the Working Group it was decided that the provision should be modified by adding to it a requirement that the beneficiary's bank had exhibited a volitional element before the beneficiary's bank was deemed to have accepted the payment order (A/CN.9/318, para. 137). However, the required volitional element was not added to the text at that session. At the nineteenth session of the Working Group the original provision was discussed at length in the context of the beneficiary's bank (A/CN.9/328, paras. 45 to 49). In favor of retaining the original text without any volitional element it was stated that contracts between banks that the receiving bank would execute payment orders when received even if funds were not yet available existed both in regard to multilateral net settlement systems and bilateral banking relations. They were entered into to increase the security of the operation of the funds transfer system. The legal security provided by those contractual obligations would be increased if the receiving bank was considered to have accepted the payment order as soon as it was received.

12. At the conclusion of the discussion at the nineteenth session it was decided to retain the original text as it applied to the beneficiary's bank and to extend the rule to receiving banks that were not the beneficiary's bank (A/CN.9/328, paras. 32 and 49; see also A/CN.9/329, para. 126 where a technical amendment was made).

Subparagraph (c)

13. Paragraph 2(c) providing that a receiving bank might expressly accept a payment order was added by the Working Gr up at its nineteenth session (A/CN.9/328, paras. 29 to 31). In the discussion doubts were raised as to the likelihood that a receiving bank would expressly accept a payment order for future implementation, but it was suggested that in the case of a large transfer a bank might be asked whether it would be prepared to handle the transaction. Its agreement would function as an express acceptance of the order.

Subparagraph (d)

14. Paragraph 2(d) provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e., by sending its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of the most important of those obligations under article 6(2) are simultaneous. However, a receiving bank accepts a payment order even when it sends its own order for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary, so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

15. Comparison with Article 4A Article 4A-209 provides that "a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order." Such a receiving bank executes the order, according to Article 4A-301(a) "when it issues a payment order intended to carry out the payment order received by the bank." That is the only way in which such a receiving bank can accept a payment order. If a notice of rejection is not given "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order", Article 4A-210(b) provides that the bank is obliged to pay interest to the sender on the amount of the order, but that failure to give notice of rejection does not constitute acceptance of the order. Article 4A-211(d) provides that "An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order." If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, Article 4A-212 provides that it is liable for breach of the agreement.

Paragraph (3)

16. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the requirement that a notice of rejection must be given was moved by the drafting group to article 5(3).

17. Paragraph (3) now provides that, if the receiving bank does not accept the payment order under paragraph (2)(b), (c) or (d), it must give a notice of rejection and that notice of rejection must be given by the execution date. If no required notice of rejection is given, paragraph (2)(a) provides that the receiving bank accepts the payment order. The provision should be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications.

18. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order (A/CN.9/297, para. 51).

19. No notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117). Furthermore, paragraph (3) appears to provide, by referring to paragraph (2)(a), that a receiving bank that had not yet received payment for the payment order need not give a notice of rejection. That would be contrary to what was decided at the twentieth session (A/CN.9/329, para. 123). In order to avoid that difficulty, in a communication to the Secretariat subsequent to the twenty-first session, the delegation of the United Kingdom has suggested the deletion of the words "otherwise than by virtue of subparagraph (2)(a)" and the addition of the following sentence:

> "Where a receiving bank has failed to give notice of rejection within the time required by this paragraph, but under subparagraph (2)(a) the payment order is not accepted because the receiving bank has not received funds from the sender, the receiving bank is not required to give notice of such non-acceptance, but remains liable for its original failure."

20. The text of article 5(1) following the eighteenth session of the Working Group stated that the obligation of the receiving bank to notify the sender of its decision that it would not comply with the sender's payment order was subject to the contrary agreement of the sender and receiving bank. Although the drafting group deleted those words from the current text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124). At the twenty-first session the Working Group adopted article 16, which gives the parties the power to vary any provision of the Model Law, unless specifically provided otherwise in the provision itself.

21. Comparison with Article 4A As indicated in comment 15, although Article 4A does not require a notice of rejection, Article 4A-210(b) requires the receiving bank to pay interest to the sender if the bank fails to execute the order or give notice of rejection "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order." While the provision applies whether the sender is a bank or not, it seems to be intended to apply primarily when the sender is a non-bank originator. No rule is given when the receiving bank has received payment in some other way but fails either to execute the order or to give notice of rejection.

Article 6. Obligations of receiving bank that is not the beneficiary's bank

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 9.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

(7) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 88
A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154
A/CN.9/328, paras. 17 to 20 and 75
A/CN.9/329, paras. 128 to 141

Comments

Paragraph (2)

1. Paragraph (2) is prior paragraph (4), drafted in essentially the current form as article 5(3)(a) at the eighteenth session (A/CN.9/318, paras. 152 and 154) and redrafted by the drafting group at the nineteenth session. The paragraph states the basic obligation of a receiving bank other than the beneficiary's bank that has accepted a payment order, i.e., to send its own proper order to an appropriate bank within an appropriate period of time. On most occasions when a receiving bank is held liable to its sender it will be for failure to comply with the requirements of this paragraph. When the receiving bank sends its own payment order to its receiving bank, it becomes a sender and undertakes the obligations of a sender under article 4.

2. Comparison with Article 4A Article 4A-302(a)(1) is essentially the same in substance.

Paragraph (3)

3. Paragraph (3) is based on paragraph (2) as it emerged from the nineteenth session (A/CN.9/328, annex), which in turn was based on the first sentence of article 5(1 bis) as it was adopted at the eighteenth session (A/CN.9/318, annex).

4. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated that it had been misdirected. The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). The duty applies whether or not the sender and the receiving bank have had any prior relationship, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18).

5. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfill its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the payment order "contains sufficient information to identify and trace the sender" (A/CN.9/328, para. 20). The words "and trace" were deleted at the twentieth session (A/CN.9/329, annex).

6. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

7. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the present wording did not seem to implement the policy expressed at the twentieth session that the Model Law should not set forth a duty to detect the misdirection but that it was appropriate to require notification once the misdirection had been detected (A/CN.9/329, para. 130). It suggested the following wording to implement the policy there stated:

> "(3) A receiving bank that detects that a payment order contains information which indicates that it has been misdirected shall give notice to the sender, if the payment order contains sufficient information to identify the sender, within the time required by article 9."

8. In accord with its suggested provision submitted to the Secretariat subsequent to the twenty-first session in respect to the existence of a procedure designed to detect errors, the delegation of the United Kingdom suggested the addition of the following sentence to its previous proposal:

> "If the receiving bank has agreed with the sender that the payment order will be subject to a procedure to determine whether it has been misdirected and the sender complies with the procedure, the bank shall be taken to have detected any such misdirection if it would have done so had it also complied with the procedure."

9. The United Kingdom delegation further noted that, if a payment order was received with an execution date some time in the future, the fact that it had been misdirected might not be discovered on the date of receipt. It suggested an amendment to article 9(2) (see article 9, comment 10) that would read as follows:

> "A notice required to be given under article 6(3) shall be given by the close of business on the day following the day of detection."

10. The United Kingdom delegation further suggested that it should be possible to contract out of the duties imposed by paragraph (3). It noted that agreements between banks often provide that a bank can rely on certain elements of a payment order; they agree that notification is not required even where a discrepancy that is discovered indicates that the payment order might have been misdirected. Effectively the sender is agreeing to bear the risk. The following wording was suggested to be added to the paragraph:

> "This paragraph does not apply if the sender and the receiving bank have agreed that the bank would rely on only certain elements of the payment order."

11. It may be noted that the proposed text would not give as broad a freedom of contract as does article 16, a provision that did not yet exist when the suggestion of the United Kingdom was sent to the Secretariat.

12. Comparison with Article 4A Article 4A-208(4) provides that "if the receiving bank knows that the name and number identify different persons," (person here means intermediary or beneficiary's bank) reliance on either one is a breach of the bank's obligations. That provision is more positive than is the Model Law in authorizing a receiving bank to rely on identification of another bank by number alone.

Paragraph (4)

13. Paragraph (4) was added at the twentieth session (A/CN.9/329, para. 132) to cover a situation that did not fall within the scope of the already existing provisions requiring notice when a message is received that purports to be a payment order but that cannot be executed as such.

14. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the provision as drafted presented two difficulties. First, the Model Law applies only if there is a payment order. Therefore, logically it could not apply to a message that did not meet the definition of a payment order. Secondly, and of greater importance, it was suggested that the provision was too widely drawn because it covered an instruction regardless of whether the receiving bank appreciated that the provision applied. The following wording was suggested:

> "(4) When an instruction is received that appears to be intended to be a payment order but that does not contain sufficient data to be a payment order or, being a payment order, cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9."

15. Comparison with Article 4A There is no equivalent provision in Article 4A, but the same result might be reached in some instances through Article 4A-208(b).

Paragraph (5)

16. Paragraph (5) as adopted at the twentieth session (A/CN.9/329, annex) is essentially the same as paragraph (3) as adopted at the nineteenth session (A/CN.9/328, annex), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

17. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers (A/CN.9/329, paras. 133 to 135). Other arguments were presented in favour of the opposite rule that, in regard to modern electronic means of transmitting payment orders where the orders were processed by number, the numbers should control the words. Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

18. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in figures only (A/CN.9/318, paras. 61 and 63).

19. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be part of a code, as a result of which the conflict might be between two sets of numbers (A/CN.9/329, para. 134). The suggestion was made that the reference should be only to a discrepancy in amount without saying how that discrepancy might appear. That suggestion was not implemented by the drafting group at the twentieth session.

20. Comparison with Article 4A There is no equivalent provision in Article 4A. In some cases Article 4A-205 governing the security procedure for the detection of error would be applicable.

Paragraph (6)

21. Although a receiving bank is normally bound to follow any instruction in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it can happen that it is not feasible to follow the instruction or that doing so would cause excessive costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith (see other suggestions at A/CN.9/329, para. 139).

22. As an alternative, the receiving bank can enquire of the sender as to the actions it should take, but it must do so within the time required by article 9. In a communication to the Secretariat subsequent to the twentieth session of the Working Group the delegation of the United Kingdom suggested that the second sentence did not clearly state that a receiving bank would not be in breach of article 9 if it enquired of the sender in the time specified in article 9. It suggested that the second sentence might read:

> "A receiving bank that is required to take action by a time specified in article 9 shall be taken to have done so if, within that time, it enquires of the sender as to the further actions it should take in the light of the circumstances."

23. Comparison with Article 4A Article 4A-302(b) contains essentially the same rule as does paragraph (6), except that a receiving bank may not choose an intermediary bank other than the one specified in the payment order received.

Article 7. Acceptance or rejection by beneficiary's bank

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51
A/CN.9/317, paras. 80 to 84
A/CN.9/318, paras. 110 to 120 and 135 to 143
A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65
A/CN.9/328, 44 to 51, 59 and 60
A/CN.9/329, paras. 142 to 147
A/CN.9/341, para. 53

Error in text in A/CN.9/341,annex

In subparagraph (1)(a) as it appears in A/CN.9/341, annex the words "receiving bank" have been used rather than "beneficiary's bank", as is here used.

Comments

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5 at the twentieth session were also introduced into article 7. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the comments to article 5 relative to use of the concept of acceptance and to paragraphs (2)(a), (b), (c) and (3) are applicable to article 7(1)(a), (b), (c) and (2).

2. Paragraph 1(c), (d), (e), (f) and (g) represents various forms of volitional act by the beneficiary's bank to accept the payment order received by it. Subparagraphs (d) to (g) were carried over from article 6(2) as adopted at the eighteenth session (A/CN.9/318, annex). At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs (d) to (g) could be replaced by words to the effect "when the beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)(d) the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank. (Compare last sentence of comment 7)

4. The discussion at the nineteenth session recognized that the granting of provisional credit to the credit party had the advantage of making the processing of credit transfers more efficient in the vast majority of cases in which cover arrived at an appropriate time. Since the receiving bank was never required to grant provisional credit as a matter of law, it would do so only where it made the credit judgment that it was highly likely to receive the cover or that, if it did not, it could recover the provisional credit from the credit party. Such a credit judgment might be reflected in an agreement with a credit party to grant such provisional credit. Such an agreement would

always authorize the receiving bank to reevaluate its decision to grant provisional credit, although the bank might be required to give advance notice of its decision that it would no longer do so.

5. The discussion at the nineteenth session also noted that the possibility that provisional credit might be reversed introduced elements of insecurity into the funds transfer system that affected not only the credit party, but in extreme cases might endanger the functioning of the entire system. Therefore, the Working Group decided that it was undesirable for a receiving bank, including the beneficiary's bank, to be allowed to reverse a credit (A/CN.9/328, paras. 59 to 60).

6. In an associated discussion at the nineteenth session the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law (A/CN.9/328, paras. 61 to 65). A discussion of netting as it might affect the Model Law is to be found in comments 34 to 44 of article 4.

Comparison with Article 4A

7. Article 4A-209 makes a larger distinction than does the Model Law between the events leading to acceptance of a payment order by the beneficiary's bank and the events leading to acceptance of an order by any other receiving bank. Article 4A-209(b)(1) is substantially equivalent to subparagraphs (c) through (g) of this article. Article 4A-209(b)(2) and (3) base the acceptance of a payment order on when the beneficiary's bank is paid for the order, i.e., when it receives credit in its account at the Federal Reserve Bank, receives final settlement through a funds transfer system (e.g., CHIPS) or "the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless ... " The "unless" clause introduces the possibility of rejection of a payment order by the beneficiary's bank. Rejection of a payment order by the beneficiary's bank is not possible when the bank receives the order through FEDWIRE. In the case of CHIPS and as far as Article 4A is concerned, the beneficiary's bank can reject a payment order until it has accepted the order in one of the ways indicated above. Under Article 4A-405(d) and (e) it is possible for a beneficiary's bank to reverse its acceptance of a payment order if a net settlement system is unable to complete the settlement.

Article 8. Obligations of beneficiary's bank

(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.

(2) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the beneficiary's bank shall give notice to the sender of the misdirection, within the time required by article 9.

(3) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(4) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(5) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 9, to its sender and to the originator's bank, if they can be identified.

(6) The beneficiary's bank shall on the execution date give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 89 to 92
A/CN.9/318, paras. 64, 66 and 156 to 159
A/CN.9/328, paras. 17 to 20
A/CN.9/329, paras. 148 to 167

Comments

Paragraph (1)

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should have rules in respect to the civil consequences of the credit transfer as in current article 14, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 12 and 13 for the notice requirement when there is no account relationship).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 7(1)(c) to (g)) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required.

5. Comparison with Article 4A Article 4A-404 specifies the obligation of the beneficiary's bank to pay to the beneficiary the amount of an order it has accepted. If the United States were to adopt the Model Law, Article 4A-404 would be the applicable law referred to in article 8(1).

Paragraphs (2), (3) and (4)

6. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 8(2), (3) and (4) of the text of article 6(3), (4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs, including the references to Article 4A, are relevant to the corresponding paragraphs of article 8.

Paragraph (5)

7. Paragraph (5) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. No bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

8. Any solution to the case envisaged presents substantial difficulties. While a discrepancy in the identification of the beneficiary may be the result of error, it may also be an indication of fraud. Rather than take the chance that the incorrect account would be credited, the Working Group decided that the transfer should be suspended and the beneficiary's bank should notify its sender and also the originator's bank, if they are identified on the payment order, of the discrepancy (A/CN.9/318, para. 64).

9. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both the sender and the originator's bank must be done within the time specified in article 9(2), i.e., on the day the payment order is received, subject to article 9(3) and (4). It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

10. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that banks be permitted to contract out of the notice obligation in paragraph (5) by adding the following words:

> "This paragraph does not apply if the sender and the bank have agreed that the bank would rely either upon the words or figures."

11. The proposed text would not give as broad a freedom of contract as does article 16, a provision that did not yet exist when the suggestion of the United Kingdom was sent to the Secretariat.

12. The delegation of the United Kingdom also noted that paragraph (5) was the only notice provision to require that notice be given directly to the originator's bank. It suggested that if the reason for such a requirement was that a discrepancy in the manner of identifying the beneficiary was particularly indicative of fraud, such a requirement might be included in other notice provisions and particularly article 8(4). Furthermore, it suggested that in any event it seemed sensible to notify the originator's bank when the sender could not be identified.

13. The delegation of the United Kingdom also suggested that there seemed to be an overlap between paragraphs (3) and (5) and that they might be rationalized.

14. Comparison with Article 4A Article 4A-207 governs the problems covered in article 8(5). The provision is too complex to be summarized adequately here, but in general the beneficiary's bank is permitted to rely upon the number alone.

Paragraph (6)

15. Any duty to notify a beneficiary who had an account with the beneficiary's bank could be left to their agreement or to the law applicable to the account relationship. Although the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

16. However, there is unlikely to be a rule in the law applicable to the account relationship as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (6), but it applies only if the beneficiary's bank has accepted the payment order and if the bank has sufficient information to give such notice (A/CN.9/329, paras. 165 and 166). Contrary to the rule in article 9(2) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution date (A/CN.9/329, para. 172; compare the notice requirement in articles 5(3) and 7(2), i.e., "not later than on the execution date").

17. Comparison with Article 4A Article 4A-404(b) provides that notice of receipt of a payment order instructing payment to an account of the beneficiary must be given by midnight of the next day but that "If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order." In both cases the obligation to give notice can be varied by agreement of the beneficiary or by a rule of a funds transfer system that is used in the transfer.

Beneficiary's right to reject credit transfer

18. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. Although the participant did not submit a proposal, the following provision suggested for the consideration of the Working Group is inspired by an informal draft supplied by him:

> "The beneficiary has the right to reject a credit transfer [even though the beneficiary's bank has accepted the payment order and even though the transfer was made to an appropriate account of the beneficiary] by notice to the beneficiary's bank before the close of the banking day following the day when the bank accepted the payment order, if
>
> (a) the beneficiary's bank has not applied the credit in conformity with paragraphs (1)(f) or (g),
>
> (b) the beneficiary's bank has not applied the credit to an obligation owed by the beneficiary to the bank,
>
> (c) when the beneficiary rejects the transfer, there is a credit balance in the account of an amount at least as much as the amount of the transfer, and
>
> (d) the beneficiary's bank is not precluded by reason of insolvency or otherwise from repaying the amount of the transfer to its sender."

19. The rejection by the beneficiary should be as soon as is feasible so as to reduce the risk to the originator. The beginning of the period during which the beneficiary might be permitted to reject the transfer could be when the beneficiary's bank accepts the payment order, when the beneficiary's bank credits the beneficiary's account or otherwise applies the credit, or when the beneficiary receives notice of the transfer. Although the most logical time from the point of view of the beneficiary would be when he receives notice of the transfer, the Model Law does not require that notice be given and banking law and practice vary greatly as to when notice might be given, or even whether notice of a transfer is given. The proposal suggests that the rejection should have to be given by the end of the banking day following the day the beneficiary bank accepts the payment order. That is a very long period of time for high-speed, high-value credit transfers, but it is difficult to decide what might be an appropriate shorter time.

20. The proposal places several limitations on the beneficiary's right to reject the payment order. The credit must not already have been specifically applied. The credit must still be available in the sense that there is a sufficient credit balance in the account. There might be a sufficient credit balance in the account when the payment order is rejected even though there had earlier not been a sufficient balance because in the meantime other credits have been made to the account. Unless the credit has been specifically applied, the proposal does not attempt to trace the credit on a first-in, first-out or other such basis. The credit must still be available in the sense that the beneficiary's bank is in a position to repay the amount of the transfer to the sender. The beneficiary should not be able to place on

the originator the risk that the beneficiary's bank has become insolvent after it has accepted a payment order for the beneficiary's benefit or that the outbreak of war or similar event reduces the value of the credit to the beneficiary's account.

21. Under article 11(b) the beneficiary's bank, like all receiving banks in the chain of the failed credit transfer, will have to refund to its sender the funds received from its sender.

22. Comparison with Article 4A Article 4A has no provision allowing the beneficiary to reject a payment order by notifying the beneficiary's bank. Compare Article 4A-406(b) on the right of the beneficiary to refuse payment from the originator when the payment was made by a means prohibited by the contract of the beneficiary with respect to the obligation.

Obligation to make funds available on pay date

23. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a pay date specified on the payment order (A/CN.9/329, para. 167).

Article 9. Time for receiving bank to execute payment order and give notices

(1) A receiving bank is required to execute the payment order on the day it is received, unless

(a) a later date is specified in the order, in which case the order shall be executed on that date, or

(b) the order specifies a pay date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

(2) A notice required to be given under article 6(3), (4) or (5) or article 8(2), (3), (4) or (5) shall be given on the day the payment order is received.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

(5) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/297, paras. 65 to 68
A/CN.9/317, paras. 94 to 107
A/CN.9/328, paras. 76 to 91
A/CN.9/329, paras. 168 to 183

Comments

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session.

Purpose of paragraph (1)

2. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order.

Same day execution

3. The general rule stated in the chapeau to paragraph (1) is that a payment order is to be executed on the day the payment order is received.

4. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329. paras. 176 and 177).

5. Nevertheless, the rule is strict and it is necessary that it be mitigated by several supplementary provisions. The first, found in paragraph (1) itself, is that the payment order may indicate that later execution is intended, either by specifying a later execution date or by specifying a pay date that indicates that later execution is appropriate.

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 5, comment 6). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 5(2) or 7(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 5(2)(a) or 7(1)(a) "until the ... bank has received payment from the sender in accordance with article 4(4)", a receiving bank that receives sufficient funds on a day later than the day the order is received and executes the payment order on that day is not in breach of its obligations under article 9(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment

orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 5(2)(b) and 7(1)(b)).

7. The third mitigating rule, which is found in paragraph (3), recognizes that banks establish cut-off times for the processing of payment orders for same day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178).

8. The fourth mitigating rule, which is found in paragraph (5), is that a branch of a bank, even if in the same State, is treated as being a separate bank for these purposes. Where the branches of a bank process payment orders on a decentralized basis, a payment order that is sent from one branch to a second branch requires the same amount of time to be executed at the branch as if the order was to be sent to a different bank (A/CN.9/328, para. 82).

Notices

9. According to paragraph (2), notices must be given on the day the payment order is received, except for the notices required by articles 5(3), 7(2) and 8(6). The notice by the beneficiary's bank to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, required by article 8(6), must be given on the execution date.

10. In a communication to the Secretariat subsequent to the twentieth session in which the delegation of the United Kingdom suggested several changes to the notice provision in article 6(3) (see article 6, comments 8 to 11), it suggested that the time within which the notice that a payment order received had been misdirected, as required by article 6(3), might be too short. If a payment order was received with an execution date considerably later than the date of receipt, the fact that it had been misdirected might not be discovered on the day of receipt. It suggested that article 9(2) should be amended as follows:

> "A notice required to be given under article 6(3) shall be given by the close of business on the day following the date of detection."

11. The delegation of the United Kingdom made a similar suggestion in regard to article 8(2) that it had made in regard to article 6(3). However, since the delegation was of the belief that the beneficiary's bank would generally verify whether it was the correct bank, a somewhat different wording was suggested as follows:

> "A notice required to be given under article 8(2) shall be given by the close of business on the day following the date on which it was, or ought reasonably to have been, detected that the payment order contained information indicating that it had been misdirected."

Execution date

12. According to article 2(k), the execution date is the date when the receiving bank is to execute the payment order in accordance with article 9. The execution date may be any of three different dates. Normally the execution date is the day the payment order is received. If a later execution date is specified on the order, the execution date is that date. If a payment date is specified on the payment order, the execution date for a receiving bank other than the beneficiary's bank is the day that is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the payment date.

13. At the twentieth session the Working Group deferred to a future session the question whether any special time period would have to be given to an originator's bank that received a conditional payment order or whether the proper result would be achieved by an interpretation of paragraph (1) (A/CN.9/329, paras. 173 and 174). However, consideration of that question is no longer necessary following the decision of the Working Group at the twenty-first session that conditional payment order should not be considered to be payment orders under the Model Law (A/CN.9/341, para. 73).

14. If the receiving bank executes the order prior to the execution date, the payment order is accepted (articles 5(2)(d) and 7(2)(d)) and the sender would no longer have the possibility to revoke the order (article 10(1)(b) and (2)(b)). At the nineteenth session it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78). However, no provision to that effect was introduced into the draft Model Law by the drafting group. The question was again raised at the twentieth session, where it was said that such a rule would have its most important effects in cases of insolvency. The Working Group decided to keep the issue in mind in its consideration of articles 10 and 12 (A/CN.9/329, paras. 168 and 169). In this regard it should be noted that the sender is not required to pay the receiving bank until the execution date (article 4(4)).

15. If a provision were introduced into the Model Law permitting a sender to revoke its payment order until the execution date, the sender would presumably be entitled to recover any funds it had already paid the receiving bank and the right of the sender to recover funds from the beneficiary would be assigned to the bank (compare article 10(6) and (7)).

16. The receiving bank's failure to execute a payment order on the execution date would lead to liability under article 12. The receiving bank might execute the payment order late because the order was received late. Under the text of article 7(2) as it was adopted at the eighteenth session (A/CN.9/318, annex) the bank that received the order late complied with its obligations if it executed the order on the day received "regardless of any execution, value or pay date specified in the order." Although no objection was expressed to that paragraph at the nineteenth session (A/CN.9/328, paras. 81 and 82), the paragraph was not included in the article as it was restructured by the drafting group. At the twentieth session the Working Group decided that the substance of prior article 7(2) was currently covered in the chapeau of article 9 where it was stated that a receiving bank was required to execute the payment order on the day it was received (A/CN.9/329, para. 170).

Payment date

17. According to article 2(1) the payment date is "the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary." (See comments 58 to 62 to article 2.) The payment date is of immediate importance in the payment order issued to the beneficiary's bank, since it is that bank that must place the funds at the disposal of the beneficiary. A payment date in a payment order sent to the beneficiary's bank functions as though it was the execution date.

18. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that the expression "pay date" could be replaced by "date when the funds are to be placed at the disposal of the beneficiary". Unless the Working Group decided that the expression "payment date" was needed in article 12(4), the definition in article 2(1) could also be deleted.

Derogation by contract

19. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for orginator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks (A/CN.9/329, para. 180). However, with the adoption of article 16 at the twenty-first session, the parties are free to derogate from any provision of article 9. If the Working Group should wish to reaffirm the policy stated at the twentieth session for some or all of article 9, it would have to do so specifically.

Comparison with Article 4A

20. Articles 4A-301(b) and 4A-302(a) in combination are substantially the same as paragraph (1). Since there are no notice requirements that are the equivalent of the ones referred to in paragraph (2), there are no time limits equivalent to paragraph (2). Article 4A-106 is the same as paragraphs (3) and (4). Article 4A-209(d) provides that a payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank.

Article 10. Revocation

(1) A revocation order issued to a receiving bank other than the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before the execution of the payment order to enable the receiving bank, if it acts as promptly as possible under the circumstances, to cancel the execution of the payment order, and

(c) it was authenticated in the same manner as the payment order.

(2) A revocation order issued to the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before acceptance of the payment order to enable the beneficiary's bank, if it acts as promptly as possible under the circumstances, to refrain from accepting the payment order, and

(c) it was authenticated in the same manner as the payment order.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) If a revocation order is received by the receiving bank too late to be effective under paragraph (1), the receiving bank shall, as promptly as possible under the circumstances, revoke the payment order it has issued to its receiving bank, unless that payment order is irrevocable under an agreement referred to in paragraph (3).

(5) A sender who has issued an order for the revocation of a payment order that is not irrevocable under an agreement referred to in paragraph (3) is not obligated to pay the receiving bank for the payment order:

(a) if, as a result of the revocation, the credit transfer is not completed, or

(b) if, in spite of the revocation, the credit transfer has been completed due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations under paragraphs (1), (2) or (4).

(6) If a sender who, under paragraph (5), is not obligated to pay the receiving bank has already paid the receiving bank for the revoked payment order, the sender is entitled to recover the funds paid.

(7) If the originator is not obligated to pay for the payment order under paragraph (5)(b) or has received a refund under paragraphs (5)(b) or (6), any right of the originator to recover funds from the beneficiary is assigned to the bank that failed to comply with its obligations under paragraphs (1), (2) or (4).

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not affect the continuing legal validity of a payment order that was issued before that event.

(9) A branch of a bank, even if located in the same country, is a separate bank for the purposes of this article.

Prior discussion

A/CN.9/297, para. 79 and 92 to 95
A/CN.9/317, paras. 68 and 120 to 133
A/CN.9/328, paras. 92 to 116
A/CN.9/329, paras. 184 to 186

Comments

1. Article 10 provides a framework for the revocation of payment orders after they have been received by the receiving bank. At the nineteenth session of the Working Group it was suggested that, since international credit transfers are almost always sent by on-line telecommunications and are processed by computer, there would be little opportunity for the sender to revoke the payment order before the order was executed by the receiving bank and that it was, therefore, unnecessary to have any provision on the subject. The reply was given that a revocation that did not arrive in time because of the use of high-speed electronic systems would not be effective. That was not, however, considered to be sufficient reason to preclude the originator or other sender from having the opportunity to attempt to revoke the order (A/CN.9/328, paras. 93 and 94).

2. The text presented to the nineteenth session of the Working Group had one set of rules that covered both the revocation and the amendment of payment orders. At the nineteenth session it was noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders (A/CN.9/328, para. 100). As a result article 10 refers only to the revocation of payment orders and no provision is made in the current draft for their amendment.

3. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the policy not to permit an amendment of a payment order was not sufficiently clear in the text and that the following wording might be added to paragraph (2):

> "A revocation order is not effective if it is expressed to cover part only of a payment order."

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke or amend a payment order once it had been received by the receiving bank, but which would also permit a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender, regardless of whether or not the payment order had been accepted, or a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). However, no action was taken since it had been agreed that the discussion of article 10 at that session was to be only exploratory.

5. Also at the twentieth session the words "or a revocation of a payment order" were placed in square brackets in articles 2(j) and 4(1) because of opposition in the Working Group to the basic scheme of article 10 (A/CN.9/329, paras. 76 and 96).

Paragraphs (1) and (2)

6. Paragraphs (1) and (2) provide essentially the same rules for the revocation of a payment order sent to a receiving bank that is not a beneficiary's bank and to a receiving bank that is a beneficiary's bank. In both cases the revocation can be sent only by the sender of the payment order; neither the originator nor an earlier bank in the credit transfer chain can revoke the order even though it may be the party interested in having the order revoked. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested the addition of the words "or other person who had the authority to bind the sender" to both paragraphs (1)(a) and (2)(a).

7. In both cases the payment order can be revoked only if the revocation is received by the receiving bank in time. In the case of a receiving bank that is not the beneficiary's bank, the event that marks the termination of the right to revoke is the execution of the order by the receiving bank. Although the current draft of the Model Law does not define what constitutes execution of the order by the receiving bank, it can be assumed to be the sending of its own payment order intended to carry out the order received (compare article 5(2)(d) with article 6(2)). While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 5(2) would not constitute execution of the order received. In the case of the beneficiary's bank, the event that marks the termination of the right to revoke is the acceptance of the order by the bank in any of the ways described in article 7(1).

8. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that paragraph (1)(b) should read as follows:

> "(b) it was received in sufficient time to enable the receiving bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from executing the payment order, and"

while paragraph (2)(b) should read as follows:

> "(b) it was received in sufficient time to enable the beneficiary's bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from accepting the payment order, and".

9. The receiving bank is given a certain period of time to act upon the revocation received. This period must be "sufficient" to enable the bank "if it acts as promptly as possible under the circumstances," to cancel the execution of its own order or to refrain from accepting the order received, as the case may be. The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act (A/CN.9/328, paras. 96 and 116). The time required will vary from one bank to another, indeed from one branch of a bank to another, and depend on the nature of the payment order and the means of communication of the revocation.

10. The revocation must be authenticated in the same manner as the payment order. This implies that the revocation must be sent by the same means of communication as was the payment order. When this wording was questioned at the nineteenth session of the Working Group, citing the case of a paper-based payment order that was revoked by a tested telex, the reply was given that an

attempt had been made to draft a requirement that the authentication had to be as good as or better than the authentication of the payment order being revoked, but that it had not proven possible to do so (A/CN.9/328, para. 114).

11. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that it would be desirable to add to the end of subparagraphs (1)(c) and (2)(c) the words "or as otherwise agreed by the sender and receiving bank".

12. At the nineteenth and twentieth sessions of the Working Group it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; see article 9, comment 14).

13. Comparison with Article 4A Article 4A-211 permits cancellation of a payment order, as well as its amendment, until the order has been accepted. A receiving bank that is not the beneficiary's bank can agree to cancel or amend an order it has received even after it has accepted the order, or can be bound to do so by a funds transfer system rule, but the bank must be able to cancel any order it has issued in execution of the order it received. A beneficiary's bank can agree, or be required by a funds transfer system rule, to cancel or amend an order that was issued in execution of an unauthorized payment order or was issued as a result of one of several types of error by the sender. Those provisions in Article 4A cover essentially the problems covered in paragraphs (1) to (4) of article 10.

Paragraph (3)

14. Paragraph (3) was introduced into the draft Model Law at the nineteenth session of the Working Group (A/CN.9/328, para. 98). Agreements restricting the right of a sender to revoke a payment order are common in multilateral payment arrangements, especially where there is delayed net settlement, and in batch processing systems where it may be difficult, if not impossible, to extract a single payment order from the batch. Paragraph (3) probably does not apply to a restriction in a telecommunications message system that prohibits the withdrawal of a message once sent. Even a telex cannot be withdrawn as a message from the public telecommunications system once it has been sent; however, the order contained in the message can be revoked under paragraph (1) or (2).

15. When paragraph (3) was introduced at the nineteenth session of the Working Group, concern was expressed over its effect since the originator might not know that there were agreements between particular banks through which the credit transfer might pass that made a payment order between those banks irrevocable (A/CN.9/328, para. 115). An agreement of a clearinghouse, for example, through which the originator's bank sent the payment order to an intermediary bank that restricted the right to revoke the order would preclude the originator from revoking the credit transfer even though the beneficiary's bank had not yet accepted an order to carry out the transfer. That result is explicitly provided in paragraph (4).

16. At the twenty-first session the Working Group adopted article 16, which provides for a general freedom of contract "except as otherwise provided in this law". If the right to revoke a payment order as provided in article 10 is retained, the Working Group may wish to reconsider paragraph (3) in the

light of article 16. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that, if the paragraph is retained, it should begin "For the avoidance of doubt" instead of "Notwithstanding the provisions of paragraphs (1) and (2)", so as not to prejudice the generality of article 16.

Paragraph (4)

17. If a receiving bank has already issued its own payment order intended to carry out the payment order received, paragraph (4) provides that it shall revoke its own order to its receiving bank. The obligation is automatic and is not dependent upon the request of the sender, but it is dependent on there not being an agreement restricting the right of the receiving bank as a sender to revoke its own order as described in paragraph (3). The effectiveness of the revocation is tested under paragraph (1) or (2). The series of messages can go from bank to bank until a payment order is revoked or the beneficiary's bank is reached. The credit transfer can no longer be interrupted by revocation of a payment order once the beneficiary's bank has accepted an order implementing the transfer.

18. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom has suggested a redraft of paragraph (4) in which the most important change would be that the revocation would have to be issued "as promptly as is reasonable in all the circumstances".

Paragraphs (5) and (6)

19. These two paragraphs specify that a sender who has sent a revocation that was or should have been effective is not obligated to pay for the payment order, as he would otherwise be under article 4(4), and is entitled to recover any funds paid. At the nineteenth session it was suggested that the sender should be entitled to receive back the original amount of the transfer less costs. This was said to be a question that arose in respect of the reimbursement of the funds in case of an unsuccessful credit transfer as well and that it would need to be addressed at a later stage (A/CN.9/328, para. 115). It may be thought that a sender who has a right to a refund under paragraph (6) should also have a right to interest on the funds for the period of time the sender was deprived of the use of those funds. Compare article 12, comments 25 to 35.

20. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that paragraphs (5)(a) and (b) should be redrafted as follows:

> "(a) if, as a result of the revocation, the payment order has not been accepted by the beneficiary's bank, or
>
> (b) if, in spite of the revocation, the payment order has been accepted due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations consequent upon the operation of paragraphs (1) and (2) or under paragraph (4)."

21. The delegation of the United Kingdom also suggested the addition of the words "from the receiving bank" to the end of paragraph (6).

22. Comparison with Article 4A Paragraphs (5) and (6) would seem to be covered by Article 4A-402(c) and (d), which in this respect are the equivalent of article 11(b).

Paragraph (7)

23. If a bank has executed a payment order in spite of receipt of an effective revocation, there is a likelihood that the funds will eventually be credited to the account of the beneficiary. Paragraph (7) gives the bank that made the error and was required to reimburse its sender the means to recover the funds by being assigned any right the originator may have had to recover the funds from the beneficiary.

24. Under some circumstances paragraph (7) will not give the bank the full protection that was anticipated and the originator may have an unjustified profit. Although the sender has a complete right to recover the funds from the bank that made the error under paragraph (6), the originator may not have a right to recover the funds from the beneficiary because it owed that amount to the beneficiary. The right assigned to the bank that made the error could be no greater than the right of the originator.

25. To some degree paragraph (7) is a replacement for article 8(7) as it was adopted at the eighteenth session (A/CN.9/318, annex), that was deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68. The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

26. In order to avoid the problems mentioned in comment 24 and because the reference in paragraph (7) to paragraph (6) was said to be incorrect, since paragraph (6) refers to paragraph (5), and paragraph (7) cannot apply if subparagraph (5)(a) applies, the delegation of the United Kingdom in a communication to the Secretariat subsequent to the twentieth session suggested the following redraft:

> "(7) If the originator has received a refund under paragraph (5)(b), the bank whose failure to comply with its obligations under paragraphs (1), (2) or (4) resulted in the completion of the credit transfer shall have such rights to recover from the beneficiary as the originator would have had if he had not received a refund. If the originator has not paid for his payment order and under paragraph (5)(b) is not obliged to do so, that bank shall have the same rights under this paragraph as if the originator had paid for the payment order and had received a refund."

27. Comparison with Article 4A There is no directly equivalent provision in Article 4A. See, however, Article 4A-211(c)(2).

Paragraph (8)

28. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted sense (as in English law where it is restricted to personal insolvency), the delegation of the United Kingdom in a communication to the Secretariat subsequent to the twentieth session suggested the following revision:

> "(8) The death, bankruptcy, or incapacity of either the sender or the originator does not, of itself, operate to revoke a payment order or terminate the authority of the sender. The word 'bankruptcy' includes all forms of personal and corporate insolvency."

29. It may be noted that article 52(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes treats a similar problem as follows:

> "1. A necessary or optional presentment for acceptance is dispensed with if:
>
> (a) The drawee is dead, or no longer has the power freely to deal with his assets by reason of his insolvency, or is a fictitious person, or is a person not having capacity to incur liability on the instrument as an acceptor; or
>
>)b) The drawee is a corporation, partnership, association or other legal entity which has ceased to exist."

30. Comparison with Article 4A Article 4A-211(g) provides that

> "A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order."

Paragraph (9)

31. This paragraph should be revised in line with the similar wording in the earlier articles.

New proposal

32. Former article 8(8) provided that a bank has no obligation to release the funds received if ordered by a competent court not to do so. When it deleted that paragraph at its nineteenth session the Working Group decided that it would consider a proposal that was to be presented authorizing courts to restrain a bank from acting on a payment order if proper cause was shown (A/CN.9/328, para. 109).

33. A proposal presented to the nineteenth session but not yet considered by the Working Group provided:

> "For proper cause and in compliance with applicable law, a court may restrain:
>
> > (a) a person from issuing a payment order to initiate a funds transfer;
> >
> > (b) an originator's bank from executing the payment order of the originator, or
> >
> > (c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

34. Comparison with Article 4A The proposal is identical to Article 4A-503, except for the last clause which is additional.

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 11. [Assistance and refund]

A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that order:

(a) where a payment order is issued to a beneficiary's bank in an amount less than the amount in the payment order issued by the originator to the originator's bank - to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank;

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank - to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank.

Prior discussion

A/CN.9/318, paras. 151 to 154
A/CN.9/328, paras. 54 to 58
A/CN.9/341, para. 56

Comments

1. Article 11 sets forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. It contains prior article 5(3)(b) and (c) as it was drafted during the eighteenth session (A/CN.9/318, para. 154) with the order of the two subparagraphs reversed. The drafting group at the nineteenth session could not decide on a proper title for this new article, so it placed the provisional title in square brackets. The article was not considered at the twentieth or twenty-first sessions.

Subparagraph (a)

2. The first obligation of a receiving bank when the credit transfer has not been successfully carried out is to take the necessary steps to cause it to be carried out. If the receiving bank is the cause of the difficulties, it would carry out its obligation under subparagraph (a) by taking the necessary actions itself. If the difficulties occurred at a subsequent bank in the

credit transfer chain, the receiving bank would be obligated to assist in causing the transfer to be carried out properly by such actions as finding out where the problem had occurred or sending new instructions to the subsequent bank.

3. Subparagraph (a) was adopted at the eighteenth session of the Working Group and was not discussed at the nineteenth session. However, the drafting group at the nineteenth session made a minor change in the text by referring to the issuance of a payment order for an amount "less" than, rather than an amount "different" from, the amount in the originator's payment order. That change made the provision more precise but did not change its substantive application, since the prior wording could itself have been applied only when the payment order had been for less than the correct amount. Consideration might be given to extending the subparagraph to the case where no payment order has been issued to the beneficiary's bank, a result that cannot be reached by interpretation of the current text.

4. Comparison with Article 4A There is no equivalent provision in Article 4A.

Subparagraph (b)

5. Subparagraph (b) sets forth one of the most important rules in the draft Model Law; if the credit transfer is not carried out in a manner consistent with the payment order issued by the originator, the sender has a right to a refund of any funds it has paid to the receiving bank. This right ultimately accrues to the benefit of the originator as the sender of the first payment order in the credit transfer chain.

6. Two different situations are envisaged under subparagraph (b): no payment order was accepted by the beneficiary's bank (perhaps because none was issued to it) and a payment order was accepted but it was inconsistent with the originator's payment order in some manner other than that it was for too small an amount. Subparagraph (b) as drafted would also apply where the payment order was for too small an amount, but in such a case the subparagraph should normally apply only to the deficiency and only if subparagraph (a) does not remedy the situation. It might apply to the entire amount in the rare situation where the transfer of too small an amount rendered the transfer commercially valueless.

7. The reason a credit transfer is not carried out successfully may be that the indication of the beneficiary or of the beneficiary's bank was incorrect on one of the payment orders in the transfer chain by reason of error or fraud. Other reasons why a credit transfer may fail to be carried out successfully are that the imposition of currency restrictions prevents the transfer from being made, for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, the beneficiary's bank refuses to accept the payment order addressed to it or the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late. If the credit to the beneficiary's account is for an amount greater than the amount specified in the originator's payment order, subparagraph (b) should be interpreted to permit the sender to recover the payment it had made in excess of the correct amount, and it might be desirable to say so explicitly.

8. Although the general policy decision made by the Working Group at its sixteenth session, and affirmed by it on several occasions, that the originator should be able to hold its bank responsible for proper performance of the credit transfer is still open to discussion (A/CN.9/297, paras. 55 to 60; see A/CN.9/328, paras. 66 to 74 and 144, A/CN.9/329, para. 188, question 4 and A/CN.9/341, para. 56), the application of that policy to the return of the principal sum where the credit transfer failed was strongly endorsed at the nineteenth session (A/CN.9/328, paras. 54 to 58). The obligation of the receiving bank is absolute and the exemptions of article 13 would not apply. At the eighteenth session the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the transfer chain and to bear the risk that the reimbursement could not be fully recovered. As it is, under article 11(b) if a credit transfer is not completed and any receiving bank is not able to reimburse its sending bank, perhaps because of the insolvency of the receiving bank or because of the cessation of payments between the two States concerned, the sending bank to that non-reimbursing receiving bank would bear the loss. Such a non-reimbursing receiving bank would normally be an intermediary bank. It would be the beneficiary's bank only if the bank had not accepted the payment order even though it had received payment for the order from its sender, a situation that would rarely arise.

9. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested a revision of the article as follows:

> "(1) If no payment order consistent with the payment order issued by the originator to the originator's bank and containing instructions necessary to implement the credit transfer in an appropriate manner is issued to the beneficiary's bank, each receiving bank shall:
>
> > (a) assist the originator and each subsequent sending bank, and seek the assistance of its receiving bank, to obtain the issue to the beneficiary's bank of a payment order which is so consistent and contains such instructions;
> >
> > (b) refund to its sender any funds received from its sender for payment for the payment order, or, where excess funds are received, refund the excess.
>
> (2) Paragraph (1)(b) also applies where a payment order is rejected by the beneficiary's bank."

10. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom confirmed its belief that the beneficiary's bank should be included in article 11(b) as a bank that may have to return funds it has received. However, it now suggests that where the beneficiary's bank is no longer holding the funds, a further provision will be needed to limit the amount the beneficiary's bank is obligated to refund to the amount that is recoverable under the applicable law by the beneficiary's bank from the person to whom the funds have been paid.

11. At the nineteenth session a suggestion was made that the amount of the funds to be returned should be the original amount of the transfer less costs. It was said that this issue would have to be addressed at a later time (A/CN.9/328, para. 115). In line with the decision of the Working Group at the twenty-first session that article 14 should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20), the Working Group may believe that the question of the allocation of the costs of the transfer of the amount to be returned under article 11(b) should also not be determined by the Model Law.

12. At the twenty-first session it was stated that where the credit transfer was not completed and the sender of a payment order had the right to get his funds back under article 11(b), the sender should also be entitled to receive interest (A/CN.9/341, para. 118). Such a decision could be implemented by adding to the text of article 11(b) as proposed by the delegation of the United Kingdom as set out in comment 9 the words "with interest" following the words "return to its sender". See also comment 31 to article 12. The period of time for which the receiving bank would have to pay interest is not stated, but it should be understood to be from the date the bank received payment for the payment order from its sender to the date it returns the funds. If the receiving bank in question in turn sent the payment order to a subsequent receiving bank, it would have the right to the refund with interest for the time its receiving bank had the funds, thereby reducing its own final cost to the interest for the time that it was the holder of funds arising out of the failed transfer.

13. Comparison with Article 4A Article 4A-402(c), (d) and (e) are the equivalent provisions. Paragraph (e) reallocates the risk of loss arising out of the inability of an intermediary bank to return the funds because it is not permitted by applicable law or because the bank suspends payments when the sender to that bank acted in conformity with an instruction in the payment order it received. That provision is not contained in the Model Law.

Article 12. Liability and damages

(1) Deleted

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 9.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and the intermediary bank executed the payment order received by it within the time required by article 9.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date or execution date stated in the order, as provided in article 9.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) Deleted

(c) expenses incurred for a new payment order [and for reasonable costs of legal representation],*

[(d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.]

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in article 6(3) or 8(2), and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.

(7) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)(d). A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

[(8) The remedies provided in this article do not depend upon the existence of a preexisting relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.]

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* Consideration may be given to allowing recovery of reasonable costs of legal representation even if they are not recoverable under the law of civil procedure.

Prior discussion

A/CN.9/297, paras. 55 to 63 and 70 to 72
A/CN.9/317, paras. 137 to 150
A/CN.9/328, paras. 66 to 74 and 117 to 144
A/CN.9/329, paras. 187 and 188
A/CN.9/341, paras. 105 to 131

Errors in A/CN.9/341, annex

Paragraph (4) uses the term "pay date" instead of "payment date", as adopted at the twenty-first session.

The text of paragraph (6) refers to articles 6(2) and 8(1) rather than to articles 6(3) and 8(2) as it should.

Comments

1. The current text of article 12 is essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments introduced at the nineteenth session are referred to below at the appropriate places. At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188). The Working Group did not have the opportunity to consider the matter further at the twentieth session.

2. At the twenty-first session the Working Group had before it a complete redraft of the article that had been proposed by the delegation of the United Kingdom in a communication to the Secretariat (A/CN.9/WG.IV/ WP.46, comment 28 to article 12). However, "the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text" (A/CN.9/341, para. 106). The discussion at the twenty-first session and the changes to the text that were adopted are indicated below.

Paragraph (1)

3. Paragraph (1) provided that a receiving bank was liable for its failure to fulfil its own obligations under article 5. Since there was a reference to article 5, the receiving bank contemplated was not the beneficiary's bank. The liability of the beneficiary's bank is considered in paragraph (4). At its nineteenth session the Working Group decided to retain the principle of paragraph (1), but to place it in square brackets until it had completed its consideration of the entire article on liability and damages in the expectation that it might be substantially redrafted (A/CN.9/328, para. 131). The Working Group deleted the paragraph at the twenty-first session "since the same matter was covered by paragraph (2)" (A/CN.9/341, para. 104).

Paragraph (2)

4. The general system of liability in paragraph (2) is that the originator can hold the originator's bank liable for the proper performance of the credit transfer. That means that the bank would be responsible to the originator for loss wherever the loss occurred. The types and extent of the losses for which the originator's bank would be liable would be those set forth in paragraph (5). In order to avoid liability the originator's bank would have to show that one of the exempting conditions in article 13 was relevant. If the loss for which the originator's bank is liable to the originator was caused by events that occurred at a subsequent bank in the credit transfer chain, the originator's bank could recover the loss from its receiving bank and each bank in turn could recover from its receiving bank until, under paragraph (3), a bank could show that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

5. This system of liability is based on the idea that the originator's bank provides a service to the originator that depends on it having established correspondent relations with other banks. It is a system of liability that is well known in other similar types of economic activity, such as the international transport of goods, where it is common for the carriage to be effected by several different carriers. In some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage occurred. The procedure envisaged by paragraph (2), similar to the procedure used in those conventions, would ease the procedural problems for the originator since he would not have to claim against a bank in a foreign country with which he had no business relationship. However, it would allow the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship (A/CN.9/341, para. 111).

6. Against this system of liability is the concept that no one should be responsible for the actions of third parties. The originator's bank is not always in a position to know, much less to control, the route that an international credit transfer will take on its way to the beneficiary's bank. When the originator requests his bank to transfer funds to a foreign country, he should know that it was likely that independent intermediary banks might have to be used (A/CN.9/341, para. 108).

7. At the twenty-first session there were contradictory statements as to the standard of care for which the originator's bank would be held liable when the loss occurred because of the acts of an intermediary bank in a foreign country. Under one view the originator's bank would be responsible if the intermediary bank did not act in accord with the performance standards of the Model Law. The example given was that the intermediary bank did not execute the payment order on the day it was received because the standard in that country was next day execution. Under another view, under article 15(1) the actions of the receiving bank, and therefore the standard of care of the originator's bank, would be measured by the rules in force in the State of the receiving bank, i.e., of the intermediary bank (A/CN.9/341, paras. 109 and 110). See comment 10 to article 15.

8. It was decided at the seventeenth session of the Working Group that the originator should also be able to hold an intermediary bank directly liable for the losses suffered, since there may be occasions when recovery from the originator's bank may not be possible (A/CN.9/317, para. 139).

9. This system of liability was discussed at length at the nineteenth session without a final decision being reached as to whether it should be retained, abandoned or modified (A/CN.9/328, paras. 66 to 74 and 144). At the twentieth session the four delegations requested to reach an agreed position in respect of article 12 were in general in agreement that the responsibility for loss should be that of the bank where the events occurred that caused the loss (A/CN.9/329, para. 188, question 4). At the twenty-first session the Working Group noted that the differences between the opposing views had not been reconciled and it decided, therefore, to retain the paragraph. It was noted that retention of paragraph (2) did not imply any judgment on the other paragraphs of article 12, and particularly on paragraph (5), although it was also recognized that there was a relationship between the type and extent of damages that could be claimed and the appropriate rules for determining which bank or banks should be responsible to the originator for those damages (A/CN.9/341, paras. 105 and 114).

10. Other decisions that have been made by the Working Group in respect of liability and damages may have a bearing on the significance of the provision. At the nineteenth session the Working Group decided that it would consider providing in the Model Law that, when there was a delay in a credit transfer, the beneficiary would have a direct right to recover interest resulting from the delay against the bank that had caused the delay (A/CN.9/328, paras. 131 and 132). At the twenty-first session it was noted that no text had been adopted, but the Working Group proceeded on the assumption that payment of the interest to the beneficiary would be the normal practice (A/CN.9/341, paras. 118 and 119; see also comments 25 to 33). At the twenty-first session paragraph (5)(b), providing that damages might include exchange losses, was deleted and it was decided that any possible recovery for such losses was to be considered in regard to indirect (consequential) damages (A/CN.9/341, para. 124; see comments 38 to 42). At the seventeenth session the degree to which indirect (consequential) damages would be recoverable was limited to situations in which the loss was caused by wilful or reckless action, while at the twenty-first session it was decided that only the bank at which those actions had occurred could be held liable (A/CN.9/317, paras. 115 to 117; A/CN.9/328, paras. 140 to 143; A/CN.9/341, paras. 114 and 126). As a result the only losses that would be subject to the procedures envisioned in paragraph (2) would be interest and the expenses for a new payment order and reasonable costs of legal representation under paragraph (5)(c).

11. It has also been decided that when a credit transfer is not carried out successfully, the originator has a right to a return of the principal sum transferred without regard to the reasons for the failure (article 11(b)). Although article 11(b) could be considered to implement the policy of paragraph (2), it is not considered to be a liability provision (see comment 8 to article 11).

12. At the twenty-first session the Working Group requested the Secretariat to propose to the Working Group a revision of the paragraph, and particularly of the second sentence (A/CN.9/341, para. 115). The Secretariat proposes that the paragraph be revised as follows:

> "A receiving bank that is not the beneficiary's bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by a delay in the completion of the credit transfer, a failure to complete the credit transfer or a failure to complete it as instructed in the originator's payment order. A receiving bank is liable under subparagraph (5)(d) only to the extent that its actions caused the loss."

13. The opening words of the first sentence of this proposed redraft use the same words that are used in articles 5 and 6. Reference is made to a delay in the completion of the credit transfer, rather than completion of the transfer within the time required by article 9, since the text of article 9 as it has evolved provides for the time within which actions are to be taken in regard to a payment order that has been received but not to the time within which a credit transfer is to be completed. Although a failure to complete a credit transfer as instructed in the originator's payment order most often will lead to a delayed completion, it seems appropriate to include it as a separate item for which the bank is liable. The original second sentence has been deleted, rather than redrafted, since it seems to be currently unnecessary. The new second sentence is intended to implement the decision of the Working Group that only the bank where the error occurred should be liable for the losses under subparagraph (5)(d).

Paragraph (3)

14. Paragraph (3) places a limit on the effect of paragraph (2) when the credit transfer is completed in a manner inconsistent with the originator's payment order. No bank that is subsequent to the error or fraud that caused the inconsistency has any liability for the fact that the credit transfer was carried out improperly. However, such a bank would have obligations under article 11 to assist in correcting the situation. At the twenty-first session it was noted that the provision was technical but that there were matters of drafting and of substance that were contained in the redraft proposed in A/CN.9/WG.IV/WP.46, comment 28 to article 12 to which the Working Group would have to return at a later time. The relevant provision was as follows:

> "A receiving bank is not liable under paragraph (2) if the payment order received by each subsequent receiving bank was consistent with the payment order received by it and neither it nor any subsequent receiving bank failed to execute the payment order it received within the time required by article 9 or to comply with any notification obligation mentioned in paragraph (6) [of the proposal]. A receiving bank that does not accept a payment order is liable under paragraph (2) only in respect of its failure to notify rejection in accordance with article 5(3)."

Paragraph (4)

15. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 8(4), by failing to accept a payment order it is obligated by contract with the beneficiary to accept or by accepting a payment order the beneficiary has instructed it not to accept.

16. It is a matter of judgment whether the Model Law should contain provisions covering such losses. On the one hand the losses would arise out of the failure in respect of the credit transfer. On the other hand it may be thought that it is not necessary to establish rules on the liability of the beneficiary's bank to the beneficiary, especially when those rules might differ from the domestic rules governing liability for an otherwise identical failure by the bank. Paragraph (4)(a) takes a middle position by referring to the existence of such liability but leaves the substance of the rules governing the liability to the law that governs the account relationship. At the seventeenth session the Working Group decided to defer any decision whether to retain or to delete the subparagraph until it had a more complete view of the entire text (A/CN.9/317, para. 150). At the twentieth session the Working Group considered a similar problem in connection with article 8 (see, article 8, comments 1 to 4).

17. At the twenty-first session the Working Group expressed a preference for the first two of the alternative formulations in square brackets, i.e., "account relationship" (A/CN.9/341, para. 117). The Working Group also decided that subparagraph (a) should include a reference to the failure of the beneficiary's bank to perform one of the obligations under article 8. In the proposal of the delegation of the United Kingdom that had been communicated to the Secretariat prior to the twentieth session, paragraph (6C) included the current text of subparagraph (4)(a) and added "or, if the beneficiary does not maintain an account with the bank, for its failure to notify him in accordance with article 8(6) that it is holding funds for his benefit" (A/CN.9/WG.IV/WP.46, para. 28). However, that does not appear to have been the intention of the Working Group. Although the report is not clear on the point, it appears that the reference to article 8 was intended to replace the words "for its improper execution or its failure to execute a payment order it has accepted". The chapeau and subparagraph (a) might, therefore, be drafted as follows:

> "The beneficiary's bank is liable
>
> (a) to the beneficiary for its failure to perform one of its obligations under article 8 to the extent provided by the law governing the account relationship, and" .

18. While that formulation has the advantage of referring to the obligations set forth in the Model Law itself, it poses a certain difficulty in that no State would have rules that would provide liability for failure to perform an obligation under article 8. Nor would it be convenient to say

> "The beneficiary's bank is liable
>
> (a) to the beneficiary for its failure to perform one of the types of obligations set forth under article 8 to the extent provided by the law governing the account relationship, and" .

19. If the reference to article 8 was not intended to replace the existing words, the provision might read as follows:

> "The beneficiary's bank is liable
>
> (a) to the extent provided by the law governing the account relationship, to the beneficiary for its improper execution or its failure to execute a payment order it has accepted as set forth in article 8, and ".

20. The beneficiary's bank might cause loss to the sender or to the originator by failing to give one of the notices required by article 8. For the treatment of such losses, see paragraph (6) and comments 43 and 44. Failure to give a notice of rejection required by article 7(2) would not cause loss to the sender or to the originator since it would lead to acceptance of the payment order by the beneficiary's bank.

21. In addition, as indicated in paragraph (4)(b), the beneficiary's bank might cause loss to the sender or to the originator by failing to place funds at the disposal of the beneficiary in accordance with an execution or payment date. (The text continues to say "pay date" by mistake.) Compare article 8, comment 23.

22. In any redrafting of article 12, consideration might be given to reversing the order of subparagraphs (a) and (b), or to placing them in separate paragraphs.

Paragraph (5)

23. In essence, paragraph (5) applies to losses caused by late or non-completion of a credit transfer. In this sense, timely completion of a transfer for less than the full amount may be considered to be a late transfer for the difference between the proper amount and the amount transferred in fact.

24. Losses arising out of unauthorized payment orders are allocated by article 4(2) and (3). Liability for losses arising out of failure to give the notice required by articles 6(3) and 8(2) is set out in paragraph (6). The obligation of each receiving bank to refund to its sender any funds received from the sender where the transfer was not successfully completed is set forth in article 11(b).

Interest, subparagraph (a)

25. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. If a receiving bank receives funds from its sender but delays execution of the payment order, the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest because it has been deprived of funds earlier than was necessary for the bank to execute the payment order. If the receiving bank receives funds late from its sender but executes the order without waiting for the funds, the receiving bank suffers a loss of interest but no subsequent party, including the beneficiary, suffers any loss. If the result of a delay or error of any kind at a receiving bank is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest.

26. If the beneficiary could recover loss of interest from the originator because of late payment of the underlying obligation, the originator might claim for the interest it had paid to the beneficiary from the bank where the delay occurred or from the originator's bank. In many cases the amount of interest the beneficiary could claim from the originator because of late payment of the underlying obligation would be more than the amount of interest due from the bank because of delayed performance of the credit transfer. At the twenty-first session, when it was suggested that the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the

originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment of the underlying obligation, less the amount already paid for the delay in the credit transfer, it was stated that such an additional amount was in the nature of indirect (consequential) damages and should be treated as such under the Model Law (A/CN.9/341, para. 120; see comment 41).

27. The Working Group considered the problem of interest extensively at the nineteenth and twenty-first sessions (A/CN.9/328, paras. 122 to 131; A/CN.9/341, paras. 118 to 123). It agreed that, in any case where the beneficiary had been credited later than it should have been because of a delay in the transfer, the receiving bank causing the delay should not benefit from the use of the funds during the period of the delay (A/CN.9/328, para. 122). It noted that it was current banking practice in many important banking centres for a bank at which a transfer was delayed to add an appropriate amount of interest to the amount being transferred. As a result the bank that received the transfer late would automatically receive the interest. This was said to be efficient and expeditious, not requiring any inquiry into the facts of the underlying transaction but giving a remedy that would normally be approximately equal to the loss suffered, and a practice that the legal system should recognize (A/CN.9/328, para. 126).

28. At the conclusion of the discussion at the nineteenth session the Working Group decided that it would be useful to consider providing in the Model Law that the beneficiary would have a direct right to recover interest resulting from the delay against the bank that caused the delay. Since the proposal raised a number of questions that would require consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at its twentieth session (A/CN.9/328, para. 131). A provision was suggested in the working paper submitted by the Secretariat to the twentieth session, A/CN.9/WG.IV/WP.44, article 12, comment 17, but it was not considered at that session.

29. At the twenty-first session it was stated that where the credit transfer was not completed and the originator had the right to get his funds back under article 11(b), the originator should also be entitled to receive the interest (A/CN.9/341, para. 118).

30. It was also noted that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of" the date on which the credit should have been entered (A/CN.9/341, para. 119). By changing the date of the credit, appropriate interest would be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank.

31. Whether the interest due as a result of the delay is credited to the account of the receiving bank as a sum of money or whether the receiving bank effectively receives interest by receiving a credit "as of" an earlier date, there is no guarantee that the receiving bank will pass it on to the next bank in the credit transfer chain, or to the beneficiary. Not only is there the

fact that the receiving bank may not perceive any legal obligation to do so, but there are occasions when the receiving bank is the only party to have suffered a loss of interest. It was pointed out at the twenty-first session that in order to overcome that situation there was a proposed rule in the United States that would require the sender (in the case of the return of the amount paid under the equivalent of article 11(b)) or the receiving bank that was the recipient of an "as of" adjustment, but that was not the ultimate party entitled to the interest, to pass on the benefit of the "as of" adjustment to the ultimate originator or beneficiary in the form of interest (A/CN.9/341, para. 119; proposed Regulation J, sec. 210.32(b)(2)). It is suggested in comment 12 to article 11 that a requirement that the receiving bank return the amount of the failed credit transfer "with interest" would automatically cause the interest to be passed back to the originator.

32. An interest rate adjustment between banks would automatically be at the interbank rate in the currency concerned when it was effected by means of an "as of" adjustment of the date on which the account was credited. An "as of" adjustment of the date of crediting a non-bank beneficiary's account would not have the same automatic effect. The effective amount of interest a non-bank beneficiary would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance is always higher than the rate the beneficiary would receive if the account was in credit.

33. As a result, even though it was suggested that the Model Law should indicate the appropriate rate of interest to be paid, and that the interest should be calculated at the interbank rate in the currency in which the payment order was expressed, the Working Group decided that it would provide only that interest was payable without indicating how that interest should be calculated (A/CN.9/341, paras. 121 and 123).

34. In a communication to the Secretariat prior to the twentieth session the delegation of the United Kingdom suggested several provisions that involved the payment of interest. Those provisions are set out in A/CN.9/WG.IV/WP.46, comment 28 to article 12, paragraphs (6A), (6A) and (6D). In respect of the right of the beneficiary to recover interest, the proposed paragraph (6B) provided

> "If a credit transfer is delayed by the improper execution of a payment order that has been accepted by a receiving bank other than the beneficiary's bank, the bank is liable to compensate the beneficiary for loss of interest. The liability of the bank to the beneficiary is discharged to the extent that it transfers to its receiving bank an amount in addition to that it received from its sender."

35. The end of the second sentence might be amended by adding the words "or makes an appropriate adjustment in the date of the credit." Furthermore, in line with the proposed rule in the United States referred to in comment 31, consideration might be given to adding a new paragraph to the effect that

> "If the receiving bank that is the recipient of interest for delay [including by means of an adjustment in the date of the entry of the debit or credit to an account] is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to its receiving bank."

Exchange losses, subparagraph (b)

36. Subparagraph (5)(b) provided that the bank would be liable for exchange losses arising out of delayed international credit transfers. After discussion at the nineteenth and twentieth sessions of the Working Group (A/CN.9/328, paras. 133 to 136; A/CN.9/329, para. 188), the subparagraph was deleted at the twenty-first session (A/CN.9/341, para. 125).

Expenses of new payment order and legal representation, subparagraph (c)

37. It was suggested at the nineteenth session of the Working Group that the first part of subparagraph (5)(c) was not of great importance because the amounts of money involved were minor, and the receiving bank might well have to bear the expenses of a new payment order as part of its obligation under article 11(a) to help rectify a credit transfer that had not been carried out properly. The second part of the subparagraph was put in brackets and the footnote was added because of the difficulties of formulating a rule that reflected the various means by which the costs of legal representation were distributed in the different legal systems (A/CN.9/328, paras. 137 to 139). At the twenty-first session the Working Group considered that the issues raised in the subparagraph were of minor importance that should be left for discussion at a later stage (A/CN.9/341, para. 125).

Other losses, subparagraph (d)

38. In respect of paragraph (5)(d) the Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). That decision was reaffirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session the formula used in the current text was taken from article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). In order to recover the indirect losses, the claimant would have to prove the intent or the reckless behaviour of the bank.

39. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula taken from article 8 of the Hamburg Rules for limiting the right to recover was said not to reflect properly the problems of making credit transfers (A/CN.9/328, para. 142). After discussion the Working Group decided to place square brackets around the words "any other loss" and around the words taken from the Hamburg Rules to indicate its intention to redraft the provision.

40. At the twentieth session three of the four delegations that were asked to formulate an agreed position were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting the provision (A/CN.9/329, para. 188, question 3).

41. At the twenty-first session the Working Group decided to limit the application of subparagraph (d) so that only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (A/CN.9/341, para. 114 and 126). Following that decision the Working Group considered at length whether the provision should be retained at all (A/CN.9/341, paras. 127 to 131). At the end of the discussion a suggestion was made to delete both paragraph 5(d) and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that paragraph (5)(d) and paragraph (8) might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the current text of paragraph (5)(d). The Working Group decided that it would need more time to study the implications of the suggestions that had been made. It placed both texts in square brackets so that it could reconsider them at the next session.

42. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that, if its proposed redraft of paragraph (5)(d) was not accepted (A/CN.9/WG.IV/WP.46, comment 28 to article 12), the proposal to combine paragraph (5)(d) with paragraph (8) might be accomplished by adding to the end of the current text of paragraph (8) the following words:

> "save any under which a bank is liable to compensate for loss because the improper or late execution or failure to execute resulted from an act or omission of that bank done with the intent to cause such loss, or recklessly and with knowledge that such loss might result."

Paragraph (6)

43. In most cases of breach of duty under the Model Law the harm that is suffered is reasonably clear and the remedy of the injured party can be left to the general provisions of paragraph (5). When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, articles 6(3) and 8(2) in the current draft, it noted that the harm suffered might not always be easy to measure. Nevertheless, it was of the view that there should be a sanction for a bank's failure to notify the sender where that failure to notify delayed the transfer (A/CN.9/318, para. 122). Where the receiving bank was in possession of funds during the period it failed to notify the sender of the misdirection, the obligation to pay interest is in the nature of restitution of what the bank can be assumed to have earned from having been in possession of the funds as well as what the sender can be assumed to have lost. Where the receiving bank was not in possession of funds, the requirement to pay interest for up to 30 days serves only as a measure of the loss the sender can be assumed to have suffered.

44. In a redraft of the entire article suggested by the delegation of the United Kingdom in a communication to the Secretariat subsequent to the twentieth session that was set forth in A/CN.9/WG.IV/WP.46, comment 28 to article 12, the following provisions were relevant to the general problems considered in paragraph (6):

> "(6) This paragraph applies to a receiving bank which is liable only in respect of its failure or the failure of a subsequent receiving bank to comply with any of the following notification obligations:

> (a) to notify rejection in accordance with article 5(3) or 7(2), where payment has not been received from the sender;
>
> (b) to notify misdirection in accordance with article 6(3) or 8(2);
>
> (c) to notify a lack of sufficient data in accordance with article 6(4) or 8(3);
>
> (d) to notify an inconsistency between the words and figures that describe the amount of money in accordance with article 6(5) or 8(4).
>
> If a bank to which this paragraph applies is liable under this article to the originator or to its sender, it is obliged to compensate only for loss of interest for a maximum of 7 days or the period during which it held the funds, whichever is the longer."

Paragraph (7)

45. Paragraph (7) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties. Paragraph (7) would constitute a limitation on the general right of the parties to vary their rights and obligations by contract that is contained in article 16 as it was adopted by the Working Group at the twenty-first session (A/CN.9/341, para. 52).

Paragraph (8)

46. Paragraph (8), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

47. At the twenty-first session it was suggested that both paragraph (5)(d) and paragraph (8) should be deleted or that they should be combined (A/CN.9/341, para. 130; see comments 41 and 42). At that session the Working Group decided to place both paragraphs in square brackets and to reconsider them at the next session.

Comparison with Article 4A

48. Article 4A-305 provides that a receiving bank is liable for its late or improper execution or failure to execute a payment order. In the case of late completion the bank "is obliged to pay interest to either the originator or the beneficiary ...". In the case of other types of improper or non-execution, the bank "is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses ... resulting from the improper execution. "If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute." In all cases additional "damages, including consequential damages, are recoverable [only] to the extent provided in an express written agreement of the receiving bank."

Proposed new paragraph

49. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that an additional difficulty with article 12 that had not so far been addressed by the Working Group was that a bank which is obliged to pay compensation to its sender or to the originator and which is entitled to recover the compensation from its receiving bank but is unable to do so because that bank is insolvent has no right to recover the compensation from a bank further down the chain. If the bank further down the chain has already paid the compensation to the insolvent bank or to an intermediary bank, it should not have to pay again, but if it has not yet paid, there seems to be no reason why it should not pass over the insolvent bank and pay the bank higher up the chain. To deal with that situation, the United Kingdom delegation suggested the following new paragraph, which is based on the structure of its redraft of article 12 in A/CN.9/WG.IV/WP.46, para. 28 to article 12:

> "A bank which is entitled to recover compensation from its receiving bank under this article but is unable to do so owing to the latter's insolvency shall, subject to paragraph (6E), be entitled to recover the compensation from any subsequent bank to the extent that that bank has not already paid compensation to its sender under this article, and that subsequent bank's liability to pay compensation to its sender shall be discharged to the extent that it pays such compensation to the first mentioned bank."

Article 13. Exemptions

> A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Prior discussion

A/CN.9/297, para. 60
A/CN.9/317, paras. 151 to 156

Comments

1. Since the liability of a receiving bank for the interest loss and expenses incurred for a new payment order would arise out of the simple fact of failure of the transfer, article 13 provides the receiving bank with its sole basis of defence in such cases.

2. Article 13 does not apply to the obligation of a receiving bank under article 11(b) to refund to its sender any funds received from the sender when a payment order consistent with the contents of the payment order issued by the originator was not issued or accepted by the beneficiary's bank. It also does not seem to apply to the bank's obligation to pay "any other loss" under

article 12(5)(d), since that provision has its own strict limitation on liability. (See article 12, comments 38 to 42.) Furthermore, it can be questioned whether the application of article 13 to loss of interest would be consistent with the decision of the Working Group at its nineteenth session that a bank that caused a delay in a credit transfer should not be allowed to earn interest on the funds that were in its possession because of the delay (A/CN.9/328, para. 122) or with the decision at the seventeenth session that the receiving bank that fails to notify its sender of a misdirected payment order should be liable for interest. (For the current situation in regard to the duty of a bank to pay interest because of a failure to fulfill one of its obligations, see article 12, comments 25 to 35 in regard to paragraph (5)(a), and comments 43 and 44 in regard to paragraph (6).)

3. Under article 13 the bank must prove the exempting condition. Although there is a list of specific circumstances that might exempt the bank from liability, the reference to "other circumstances" indicates that the list is not exhaustive. The current draft of article 13 has not been discussed by the Working Group.

4. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom has suggested a redraft as follows:

> "A receiving bank and any bank to which the receiving bank is liable under article 12 is exempt from liability for a failure to perform any of its obligations under that article if the bank proves that the failure was due to circumstances which were beyond the bank's control and which it could neither avoid nor overcome."

5. Comparison with Article 4A There is no equivalent provision in Article 4A.

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. Payment and discharge of monetary obligations; obligation of bank to account holder

(1) Deleted

(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

(2 bis) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) Deleted

Prior discussion

A/CN.9/317, paras. 157 to 164
A/CN.9/328, paras. 37 to 43
A/CN.9/329, paras. 189 to 192
A/CN.9/341, paras. 11 to 23

Comments

Paragraph (1)

1. Paragraph (1) provided that monetary obligations could be discharged by interbank credit transfers leading to credit to an account. The paragraph was deleted at the twenty-first session (A/CN.9/341, para. 12). The reasons given were that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer and that it might be contrary to the monetary policy of some States to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

Paragraph (2)

2. Prior to the twenty-first session paragraph (2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order. The beneficiary's bank became indebted to the beneficiary at the same time. The drafting history of that prior provision is set forth in A/CN.9/WG.IV/WP.46, comments 5 to 9 to article 14. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 13 to 17).

3. Although there was a widespread feeling in the Working Group that the Model Law should neither provide that a debtor had a right to discharge an obligation by transferring funds to the credit of the creditor in his bank account nor provide that if such a transfer was made the obligation would be discharged to the extent of the payment order received, there was a recognition that it would be useful to provide a rule that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, it was thought to be useful for the Model Law to indicate the time when such a discharge took place.

4. Paragraph (2) applies only if the transfer was for the purpose of discharging an obligation of the originator/debtor to the beneficiary/creditor and if that obligation could be discharged by credit transfer to the account indicated by the originator. Although it is unlikely that any State has a general prohibition against credit transfers, and especially international credit transfers, it is possible that certain obligations can be discharged only by payment in cash or by some other specified means. What is more likely is that in a given State an obligation is discharged by credit transfer to an account of the beneficiary only if the transfer is done with his consent. It may be that the consent need not be specific, that it could be implied from the very fact of having a particular type of account, from the indication of the bank account numbers on an invoice or from other similar circumstances.

5. If paragraph (2) applies, it provides that the obligation is discharged when the beneficiary bank accepts the payment order. Although not specifically so stated in paragraph (2), the payment order accepted by the beneficiary's bank must have been addressed to the proper account. If the payment order was addressed to the proper account but the beneficiary's bank failed to credit the account or credited the wrong account, the obligation from the originator to the beneficiary is discharged and if the beneficiary suffered loss as a result of the misapplication of the credit, he must look to his bank for reparation under the law applicable to the account relationship.

6. Paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash. The amount in question is the amount of the payment order accepted by the beneficiary's bank. If the beneficiary's bank charges a fee for receiving and processing the payment order, the fee is at the cost of the beneficiary. However, if the payment order accepted by the beneficiary's bank is for an amount less than the amount in the payment order sent by the originator's bank as a result of fees charged by intermediary banks, the originator is not discharged of his obligation to the beneficiary to the extent of those fees. Compare comment 8.

7. In most cases when less than the full amount of the obligation is paid, the obligation is discharged to the extent of the payment. However, in some cases the obligation is indivisible and payment of less than the full amount does not operate as a discharge of any of the obligation (A/CN.9/328, para. 39). Those are questions that are settled by doctrines outside the law of credit transfers. However, in order to know the effect of a transfer of a sum that is less than the entire obligation, paragraph (3) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash.

8. Comparison with Article 4A Article 4A-406 has substantially the same rule in respect of time of discharge, subject to the qualification that the acts of acceptance of a payment order by a beneficiary's bank are slightly different in Article 4A-209(b) from what they are in article 7. Article 4A-406(c) provides that the extent of the discharge is the amount of the originator's order "unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges."

Paragraph (2 bis)

9. Although earlier versions of the draft Model Law had implied that the credit transfer was completed when the beneficiary's bank accepted the payment order, a specific rule as to when the credit transfer was completed was first introduced into the draft Model Law at the twentieth session when it was placed in the definition of "credit transfer" in article 2(a) (A/CN.9/329, paras. 31 to 33). At the twenty-first session it was moved to article 14 (A/CN.9/341, para. 17). As had previously been the case, the credit transfer is completed when the beneficiary's bank accepts the payment order.

10. Although the general policy of the Model Law is not to enter into the relationship between the beneficiary and the beneficiary's bank, paragraph (2 bis) goes on to say that when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. The provision does not provide when or how the beneficiary's bank must make the funds available to the beneficiary or the

extent to which the beneficiary's bank can charge the beneficiary a fee for receiving and processing the transfer. Those are questions to be settled by the law applicable to the account relationship.

11. Paragraphs (2) and (2 bis) are complementary in that, if the credit transfer was for the purpose of discharging an obligation, the beneficiary's claim against the originator/debtor is discharged at the same moment and to the same extent that the beneficiary's claim arises against the beneficiary's bank.

12. Comparison with Article 4A Article 4A-104(a) provides that "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." The acts of acceptance of a payment order by the beneficiary's bank are somewhat different in article 4A-209(b) from what they are in article 6.

Review of the concept of acceptance

13. At the twenty-first session the Working Group noted that by its adoption of paragraphs (2) and (2 bis) in their current form, it had decided that the point of time when the credit transfer was completed with the legal consequences that followed was when the beneficiary's bank accepted the payment order addressed to it. Consequently, the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 (A/CN.9/341, para. 17).

14. In a communication to the Secretariat prior to the twentieth session the delegation of France proposed a different formulation for what is presently the first sentence of paragraph (2 bis). The French proposal is as follows:

> "Unless otherwise agreed by the sender and the beneficiary, a transfer is completed when the beneficiary's bank places the funds at the beneficiary's disposal or notifies him that it is holding the funds for his benefit, in accordance with article 8(1) or (6)."

If the French proposal was accepted, consequential changes would have to be made to paragraph (2) and to the second sentence of paragraph (2 bis).

Paragraph (3)

15. Paragraph (3) is concerned with a problem that is difficult, even though it does not involve a significant amount of money, when credit transfers pass through several banks. It could be expected that the originator would be responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for that eventuality. In order to overcome that problem, paragraph (3) as it is set out above provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by the beneficiary's bank. Therefore, the originator would not be in breach of contract for late or inadequate payment. Nevertheless, unless the beneficiary agrees to pay the charges, which often occurs, the originator would be obligated to reimburse the beneficiary for them.

16. At the twenty-first session the Working Group decided that paragraph (3) should be redrafted to state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20).

17. In implementation of that decision the Secretariat would suggest that paragraphs (2 bis) and (3) should be redrafted as follows:

> "(2 bis) A credit transfer is completed when the beneficiary's bank accepts a payment order consistent with the payment order issued by the originator. A payment order issued to the beneficiary's bank is consistent with the payment order issued by the originator even though the amount of the transfer has been reduced by fees charged by one or more intermediary banks. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.
>
> (3) The provisions of paragraph (2 bis) do not prejudice any right the beneficiary may have to recover from the originator the amount of the fees deducted from the amount of the transfer."

18. A provision that the originator's bank has fulfilled its obligations to the originator when the credit transfer is completed has not been included, since it would seem to be a natural consequence of completion of the transfer.

19. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that the decision of the Working Group might be implemented by the following redraft of paragraph (3):

> "A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because any receiving bank has deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator."

20. Comparison with Article 4A Article 4A-302(d) contains a prohibition on the collection of charges "by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges ... " unless instructed by the sender to do so. Article 4A-406(c) provides that if charges of one or more receiving bank have been deducted (perhaps by a foreign bank) "payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges."

Paragraph (4)

21. Paragraph (4) provided that the account of a sender, including but not limited to the originator, was to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased when the receiving bank accepted the payment order. Paragraph (4) would have had its most important application in determining whether credit was still available in the account holder's account if legal process had been instituted against the account or insolvency proceedings had been instituted against the sender. At the twenty-first session the Working Group deleted the paragraph (A/CN.9/341, para. 22).

Order of paragraphs

22. With the new content of paragraph (3) the Working Group might consider that the logical order for article 15 would be paragraphs (2 bis), (3), (2), to be renumbered as (1), (2) and (3). Alternatively, current paragraph (2) might become a separate article.

New title of article and of chapter

23. At the twenty-first session the Working Group noted that the title of the article should be changed to reflect the current content of the article (A/CN.9/341, para. 23). If article 14 is divided into two articles, as suggested above, article 14 might be entitled "Completion of credit transfer" and article 14 bis might be entitled "Time and extent of discharge of obligation". If the article 14 is not divided, the title might be "Completion of credit transfer and discharge of obligation".

24. Whether or not current article 14 is divided, the title of the chapter might be changed to "Completion of credit transfer and discharge of obligation".

CHAPTER V. CONFLICT OF LAWS

Article 15. Conflict of laws

[(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.]

Prior discussion

A/CN.9/297, paras. 34 to 36
A/CN.9/317, para. 165
A/CN.9/WG.IV/WP.42, paras. 69 to 80
A/CN.9/341, paras. 24 to 49

Comments

1. The Working Group at its seventeenth session requested the Secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The draft provision set out above was prepared for the eighteenth session of the Working Group. The problem of conflict of laws was considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considered the issues especially in light of the decisions of the Working Group at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers. At the twenty-first session the Working Group made a number of policy decisions that have not as yet been incorporated into the text. It also decided to place the entire article in square brackets pending a final review at a later session (A/CN.9/341, para. 49).

Inclusion of conflict of laws provisions in the Model Law

2. At the twenty-first session there was a long discussion as to whether the Model Law should retain any provision on conflict of laws (A/CN.9/341, paras. 33 to 37). One objection to retaining any provision was that a certain number of States were already parties to bilateral or multilateral conventions on conflict of laws, and in particular to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities, and that it would be difficult for those States to adopt any conflict of laws provisions that might be in the Model Law. A second objection was that no single conflicts rule would be appropriate for both high speed electronic transfers and paper-based transfers. A third objection was that, considering the complexity of the issues involved, the current text did not have the degree of refinement that would make it acceptable to most States.

3. The Working Group decided to retain a provision on conflict of laws, primarily on the grounds that it could not be anticipated that the law governing international credit transfers would be uniform in the entire world by virtue of all States having adopted the Model Law in its entirety. Therefore, it was necessary for parties in States that had adopted the Model Law to know what law would govern the various relationships in an international credit transfer. Although it was possible that some States that would adopt the Model Law might have difficulties in adopting the conflict of laws provisions because of bilateral or multilateral conventions to which they might be a party, that was no more of a reason not to include such provisions in the Model Law than the existence of national provisions on the substance of the law governing credit transfers would be a reason not to include equivalent substantive provisions in the Model Law.

Paragraph (1)

4. One of the primary difficulties that the Working Group faced in preparing a legal regime for international credit transfers is the dichotomy between the point of view of the originator and beneficiary of the credit transfer (particularly when neither of those parties is a bank) and that of the implementing banks. From the point of view of the originator and the beneficiary, the transfer is a single operation in which their rights and obligations in respect of the transfer itself should be governed by a single law. From the viewpoint of the banks an international credit transfer is effectuated by a series of individual payment orders giving rise to rights and obligations of the sender and the receiving bank. From that point of view, each bilateral relationship in the credit transfer chain is a separate banking transaction. Being a separate banking transaction, the law applicable to that relationship might be different from the law applicable to the other bilateral relationships that taken together constitute the credit transfer chain. That, however, is unsatisfactory in that the smooth implementation of international credit transfers requires that the rights and obligations of all parties are consistent with one another.

5. The following proposal was made at the twenty-first session to overcome those difficulties:

> "A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

6. In support of the proposal it was stated that it was particularly important that one set of rules govern the rights and obligations of all the parties when the transfer was a high-speed transfer (A/CN.9/341, paras. 24 to 32). It was said that, unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer. It was pointed out that the technique suggested had already been implemented by CHIPS in its new rule 3 and the law of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS (the CHIPS rule is set out in A/CN.9/WG.IV/WP.47).

7. The proposal was rejected by the Working Group on the grounds that, even if it might be reasonable when restricted to the relationships between the banks, the proposal was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen. The proposal would have given the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and unfavourable to the non-bank originators and beneficiaries.

8. At the twenty-first session the Working Group tried to find other rules that would also have led to the application of a single law to the entire transaction. One suggestion was that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank A/CN.9/341, para. 38). Finally, it was decided that the only way to ensure that the Model Law might become applicable to the entire credit transfer was by its adoption by the several States concerned (A/CN.9/341, para. 39).

9. While the Working Group had not been willing to allow any group of banks to decide that the Model Law or any other law would apply to parties to the transfer that were not parties to the choice-of-law agreement, the Working Group was in favour of permitting the parties to choose any law they wished to govern their relationship (A/CN.9/341, paras. 44 and 45).

10. The Working Group decided that in the absence of a choice of law by the parties, the law of the receiving bank should apply to that segment of the transfer (A/CN.9/341, paras. 46 and 47). The only exception was that it should be made clear that the Model Law did not purport to determine what law would determine the authority of the actual sender to bind the purported sender under article 4(1).

Paragraph (2)

11. Although there was widespread sentiment at the twenty-first session for deleting paragraph (2) entirely, it was provisionally retained since a rule had been retained in article 14(2) as to the time when an obligation would be discharged by a credit transfer (A/CN.9/341, para. 48).

Comparison with Article 4A

12. Article 4A-507 is generally consistent with paragraph (1), as the Working Group decided at the twenty-first session to modify it, and with the second sentence of paragraph (2), except that Article 4A would apparently apply the law of the receiving bank to the question whether an actual sender was authorized to send a payment order. Article 4A-507(c) is a slightly more complicated version of the provision set out in comment 5 that was rejected by the Working Group at the twenty-first session.

Proposed redraft of article 15

13. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested the following redraft of article 15:

> "(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement the law of the State of the receiving bank shall apply.
>
> (2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).
>
> (3) Where the rights and obligations referred to in paragraph (1) are embodied in a contract, that paragraph shall not affect the application of any rule of law

(a) for determining which law governs the formal validity of the contract; or

(b) applying the law of another State if it appears from the circumstances as a whole that the contract is more closely connected with that State.

(4) Paragraph (1) shall not apply to the extent that its application would be manifestly incompatible with the public policy of the forum.

(5) The application of the law of any State specified by this article means the application of the rules of law in force in that State other than its rules of private international law.

(6) For the purposes of this article

(a) where a State comprises several territorial units having different rules of law each territorial unit shall be considered to be a separate State, and

(b) branches of a bank in different States shall be considered to be separate banks."

14. The delegation of the United Kingdom noted that the purpose of paragraph (3) was to make article 15 compatible with the Rome Convention on the Law Applicable to Contractual Obligations. It also noted that its proposed redraft would delete the current paragraph (2).

Article 16

Except as otherwise provided in this Law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

Prior discussion

A/CN.9/318, para. 34
A/CN.9/WG.IV/WP.47
A/CN.9/341, paras. 50 to 52

Comments

1. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to the agreement of the interested parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). As a result a number of the individual articles contained a provision permitting or restricting the parties from derogating from the specific provision. A part of a proposal submitted by the United States prior to the twenty-first session, and distributed as A/CN.9/WG.IV/WP.47, contained two paragraphs in respect of the right to vary the provisions of the Model Law. The first paragraph of the proposal was adopted by the Working Group as article 16 (A/CN.9/341, para. 52). The second paragraph, which was not pursued by the United States delegation after a corresponding proposal in respect of article 15 had been rejected (see comment 7 to article 15), provided that rules adopted by a funds transfer system could be effective between the participating banks "even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule."

2. Under article 16 the agreement of the affected party need not be with the party to the credit transfer who claims under the agreement. For example, an agreement of the originator with the originator's bank that the beneficiary's bank in another State could execute the payment order it received on the basis of the account number only would be binding on the originator as against the beneficiary's bank.

3. When the Working Group adopted article 16 it decided to review each of the substantive articles to determine whether the statements in the individual substantive provisions as to the effect of an agreement should be retained or could be deleted (A/CN.9/341, para. 52). In the current draft mention of the effect of contractual rules is made in articles 2(j), 4(4), 5(2)(b), 6(5), 7(1)(b), 8(4), 10(3), 10(4), 10(5), 12(7), 14(1), 14(3), 15(1) and 15(2). See the comments to those provisions as to the effect of article 16.

4. Comparison with Article 4A Article 4A-501(a) is identical to article 16. Article 4A-501(b) is a longer version of the provision referred to in comment 1 and set forth in A/CN.9/WG.IV/WP.47 that was rejected by the Working Group at the twenty-first session.

Proposed title and location of the article

5. It is suggested that article 16 might be entitled "Variation by agreement". It is suggested that article 16 might be moved to article 3.